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The Commonwealth of Massachusetts.

INDUSTRIAL ACCIDENT BOARD.

VOLUME II.

REPORTS OF CASES

UNDER THE

WORKMEN'S COMPENSATION ACT,

DETERMINED BY

**COMMITTEES OF ARBITRATION, THE INDUSTRIAL
ACCIDENT BOARD AND THE SUPREME
JUDICIAL COURT.**

JULY 1, 1913, TO JUNE 30, 1914, INCLUSIVE.

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INTRODUCTION.

The Close of the Second Administrative Year. — The Industrial Accident Board presents, in the pages which make up this, the second volume of cases decided under the Workmen's Compensation Act, the most important and interesting of the decisions of committees of arbitration, the Board and the Supreme Judicial Court during the year beginning July 1, 1913, and ending June 30, 1914.¹ The Board has not attempted to present a report of every case heard under the statute, but has contented itself with the publication of a representative selection of the large number decided, believing that this course will the better commend the volume to that large section of the public concerned in the administration of the law.

Explanation of Certain Changes in the Law. — It should be remembered, in connection with the reading of the reports of cases here published, that the law has been amended in certain important particulars, to take effect after the decisions in point indicated the necessity for these amendments. Hereafter, a wife who is living apart from her husband for justifiable cause at the time of the injury will be entitled to be "conclusively presumed to be wholly dependent for support." The words "or casual" have been stricken from the statute, so that all employees engaged in the usual course of the trade, business, occupation or profession of their employer, except masters of and seamen on vessels engaged in interstate or foreign commerce, will receive compensation. These amendments nullify the Supreme Judicial Court's decisions in the Gallagher and Gaynor cases, respectively.

A Guide to the Cases. — Immediately preceding this introduction will be found an "index to cases" and an "index to

¹ Decisions of the Supreme Judicial Court are included, however, up to the time the forms were closed by the printer.

cases determined on appeal by the Supreme Judicial Court," the indexes being arranged alphabetically and cross-indexed to show the names of insurers as well as employees. A comprehensive "subject index" will be found in the pages which close the volume, and should be consulted by those who desire to refer to cases in which particular questions under the statute have been raised.

The Supreme Judicial Court as a Beacon Light. — The Supreme Judicial Court, in its capacity as the court of last resort, has passed upon a large number of cases on appeal during the year immediately following the publication of the first volume of cases. Almost without exception it has affirmed the findings of the Industrial Accident Board, and the light which may be had by a perusal of the accompanying digest will give the reader an idea of the principles which underlie the decisions, as enunciated by the supreme judicial body.

Acceleration of Previously Existing Heart Disease to a Mortal End sooner than Otherwise is a Personal Injury. — The striking sentence in the decision of the Supreme Judicial Court in the Brightman case is the following from the pen of Rugg, C.J.: —

Acceleration of previously existing heart disease to a mortal end sooner than otherwise it would have come is an injury within the meaning of the Workmen's Compensation Act.

Brightman's Case stated briefly. — The employee was a cook upon a "lighter." The vessel began to sink at the dock, and he made several hurried trips to and from the vessel in an attempt to save some of his clothing. Previously he had suffered from valvular heart disease, and his exertion in the effort to save his belongings so aggravated the heart weakness as to cause his death.

The Saving of his Clothing was a Reasonable Act. — The court held that Brightman was within the scope of his employment in his endeavor to save his clothing, and that it was an implied term of his contract of service to use reasonable effort to this end in an exigency like that which arose.

The court states: —

The perils of the sea were risks arising out of and in the course of the employment of the deceased. The sinking of the boat obviously was one

of these perils. It is impossible to say as a matter of law that it is not one of the instincts of our common humanity to try to save from a sinking vessel all of one's possessions that reasonably can be secured.

Death results from the Injury when Chain of Causation is not broken by a New Intervening Act. — In the Burns case the court held that the death of the employee from septicæmia was due to the injury, since no new intervening cause had broken the chain of causation connecting the injury with death.

Additional Compensation for Specific Injury ceases at Death. — The employee, in the Burns case, had suffered the permanent incapacity of both legs by reason of the injury, and his dependent claimed that the "additional compensation" due therefor should continue until the end of the period of one hundred weeks, as provided by the statute. The court held that "this special compensation ceases with the death of the person injured," and that "it is a right peculiar to himself, not created for the benefit of his dependents."

Additional Compensation on Account of Specific Injuries may not be deducted when Death ensues. — The court held, in the Nichols case, that the "additional compensation" paid the employee, before death, on account of the specific injury to the third finger of his right hand, should not be deducted from the compensation awarded his widow.

Plain Words should be given their Ordinary Signification. — The language of the court, in connection with the Nichols case, is significant: —

The statute not having been designed to promote but to decrease the opportunity for unnecessary litigation, its purpose will be best subserved if plain words are given their ordinary signification; and no provision being found in section 6 for any deduction of this amount, the widow as the sole dependent is entitled to compensation from the date of the accident.

Injury to Employee while engaged in performing the Work that he was hired to do covered by the Statute. — The court held, in the Howard case, that the injury to the employee, who was engaged in trimming a tree on church property, having no connection with the work of the subscriber, was covered, since "Howard was employed to trim trees, and was to receive his orders from the company through Kennedy. It was no part of

his business to inquire into the right of the company to trim any particular tree. He was to receive his orders from Kennedy and to obey them. At the time he was hurt he was doing what he had been hired to do." Kennedy, the foreman, also was the tree warden of the town of Stoughton, and ordered the employee to trim the tree upon which the injury occurred. The insurer claimed such employment was "casual" and not "in the usual course of the trade, business, profession or occupation" of the company.

Lead Poisoning by Absorption a "Personal Injury." — The employee, in the Johnson case, had been absorbing lead poisoning during his occupation for a period of twenty years, eight months of which period were within the time that the Workmen's Compensation Act was effective. Finally, he became incapacitated for work by reason of the lead poisoning, and it was held to be a "personal injury" under the act. The Supreme Judicial Court held that the Board was right in its findings that lead poisoning was a "personal injury;" that the date of such personal injury was the day upon which the employee first became incapacitated for work; and that said personal injury arose out of and in the course of Johnson's employment. The court referred to its decision in the Hurle case as more fully covering its reasons for deciding that injuries other than by visual contact or direct lesion are within the scope of the compensation statute.

Bodily Harm caused by Noxious Vapors is a "Personal Injury." — In the Hurle case the Supreme Judicial Court gives a broad construction to the words "personal injury" as used in the act, stating that there is nothing in the language of the statute which leads to the conclusion that it was there used in a narrow or constricted sense. It is stated that these words, "personal injury," have been held to be broad enough to include a husband's right to recover for damage sustained by bodily harm to his wife, the alienation of a husband's affection, the seduction of one's daughter and other kindred tortious acts. At common law the incurring of a disease or harm to health is such a personal wrong as to warrant a recovery if the other elements of liability for tort are present.

The court states that the case of *Hood & Sons v. Maryland*

Casualty Company, 206 Mass. 223, goes far toward deciding the case at bar. In that case it was held that the employee, who had become infected by glanders while cleaning a stable, was entitled to damages. The court sums up: —

The noxious vapors which caused the bodily harm in this case were the direct production of the employer. The nature of the workman's labor was such that they were bound to be thrust in his face. The resulting injury is direct. If the gas had exploded within the furnace and thrown pieces of cherry-hot coal through the holes into the workman's eyes, without question he would have been entitled to compensation. . . . There appears to be no sound distinction in principle between such case and gas escaping through the holes and striking him in the face, whereby through inhalation the vision is destroyed.

Nature and Conditions of Employment must make it likely that Personal Injury is likely to happen. — The fact that an employee receives an injury, as in the Milliken case, by reason of his effort to get a horse and wagon to the stable, goes no farther than to show that such injury was received "in the course of his employment." In order to hold that the injury arose "out of" his employment, it must be shown that the nature and conditions of the employment were such that the personal injury which in fact happened was one likely to happen to an employee in that employment. The court says: —

There is nothing in the employment of driving a wagon which makes it likely that the employee will alight from his wagon, wander to and fall into a swamp, and lie there all night. . . . If the horse driven by Milliken had run away and Milliken had been thereby thrown out and killed, the personal injury in fact suffered in that case would have been one which from the nature of his employment would be likely to arise, and so would be one "arising out of his (the employee's) employment." But, as we have said, there is nothing in the employment of driving a wagon which makes it likely that the employee will alight from his wagon, wander to and fall into a swamp, and lie there all night. . . . It seems plain that if Milliken's death was caused by a personal injury, it was one which happened some four or five years before the occurrence here complained of and before the Workmen's Compensation Act was passed. At that time he fell from his wagon, and striking on his head suffered as a result "an impairment of his memory."

Employee who receives Injury while using Common Stairway not under Control of her Employer entitled to Compensation. —

In the Sundine case the employee received a personal injury while going down a flight of stairs of the building in which she was employed to perform her work for an independent contractor of the subscriber. There was no other way by which she could go to the street except down the stairway on which she was injured. Neither the independent contractor nor the subscriber had control of the stairs, though they and their employees had the right to use them. The court says:—

It was a necessary incident of the petitioner's employment to use these stairs. We are of the opinion that, according to the plain and natural meaning of the words, an injury that occurred to her while she was so using them arose "out of and in the course of" her employment.

Injury on Railroad Tracks after Working Hours not covered. — The court held, in the Fumiciello case, that the employee, who was compelled, by reason of the fact that he lived at a certain boarding house, to go to and from his place of employment by means of the railroad track, and who was fatally injured while so doing, was not within the scope of his employment.

The court states:—

The contract of employment did not provide for transportation or that he should be paid for the time taken in going and returning to his place of employment, and when the day's work had ended the employee was free to do as he pleased. If he had chosen to use the public ways, and had been injured by a defect or passing vehicle, the administrator could not recover against the employer because there would be no causal connection between the conditions of employment and the injuries suffered.

Serious and Willful Misconduct defined. — The court, in the Burns case, defines serious and willful misconduct, as follows:—

Serious and willful misconduct is much more than mere negligence, or even than gross or culpable negligence. It involves conduct of a quasi-criminal nature,—the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences.

Serious and Willful Misconduct by Employee must be a Deliberate Act. — In the Nickerson case the court held, with the Industrial Accident Board, that his decision to continue his work as a whitewasher, instead of waiting until the machinery

had shut down, was "more like a sudden thought than a willful act. It seems that it should fairly be regarded as a minor transgression, at most, from his standpoint, and not as 'serious and willful misconduct.' " The court adds: —

The fact that the injury was occasioned by the employee's disobedience to an order is not decisive against him. To have this effect, the disobedience must have been willful, or, as was said by Lord Loreburn, in *Johnson v. Marshall Sons & Co., Ltd.* (1906), A. C. 409, 411, "deliberate, not merely a thoughtless act on the spur of the moment."

Employee's Transportation an Incident of his Employment. — In the Donovan case the employee, in accordance with his usual custom, was riding home in a vehicle furnished by his employer, when he received the personal injury which incapacitated him. The Board found that such transportation was incidental to his employment, and the Supreme Judicial Court affirmed the finding. The court says: —

The finding of the Industrial Accident Board, that Donovan's transportation was "incidental to his employment," fairly means, in the connection in which it was used, that it was one of the incidents of his employment; that it was an accessory, collateral or subsidiary part of his contract of employment, — something added to the principal part of that contract as a minor, but none the less a real feature or detail of the contract. Whatever has been uniformly done in the execution of such a contract by both of the parties to it well may be regarded as having been adopted by them as one of its terms. Especially is this so where none of the provisions of the contract have been shown by either party, but everything is left to be inferred from their conduct.

Employee who fails to obtain Employment by Reason of Incapacity due to Injury entitled to Compensation on Basis of Total Incapacity for Work. — The Supreme Judicial Court, in the Sullivan, Duprey and Stickley cases, affirms the findings and decisions of the Industrial Accident Board that, under the statute, an employee who is unable to obtain any employment by reason of incapacity due to the injury is entitled to compensation on the basis of total incapacity for work.

The language of the court in the Sullivan case gives effect to the principle upon which these cases were decided, and is, in part, as follows: —

The object of our statute was to give compensation for a total or partial loss of the capacity to earn wages. (Gillen's Case, 215 Mass. 96, 99.) If, as in this case, the injured employee, by reason of his injury, is unable, in spite of diligent efforts, to obtain employment, it would be an abuse of language to say that he was still able to earn money, — that he still had a capacity for work, even though his physical powers might be such as to enable him to do some kinds of work if practically the labor market were not thus closed to him. He has become unable to earn anything; he has lost his capacity to work for wages and to support himself; not by reason of any change in the market conditions, but because of a defect which is personal to himself, and which is the direct result of the injury that he has sustained. He is deprived of the benefit which the statute promises to him if he is told that because he could do some work if he could get it he is not under an incapacity for work, although by reason of his injury he can obtain no opportunity to work.

Finding that Normal Use of the Hand was wholly gone equivalent to Decision that Hand is incapable of Use. — Meley, the employee, received a serious injury to the right hand by reason of which that member was permanently disabled; also, the little finger of the left hand was so injured as to be incapable of use. The Board awarded compensation on account of total incapacity for work, and also ordered the insurer to pay specific compensation for sixty-two additional weeks, fifty weeks on account of the injury to the right hand and twelve weeks because of the incapacity for use of the little finger of the left hand. The court says: —

The hand was cut across and most of the flexor tendons were severed. Those in the thumb were cut. A physician testified that the hand was permanently disabled. . . . Certainly it could be found that the normal use of the hand was wholly gone, and that the hand was "so injured as to be incapable of use." The incapacity of use need not be tantamount to an actual severance of the hand; it is enough that the normal use of the hand has been taken entirely away.

Each Hand should be considered separately. — The insurer also raised a question as to the right of the Board to award specific compensation for each hand separately. The court held, however, that each hand should be considered separately, and the specific compensation due "in addition to all other compensation" awarded on that basis.

Mother and Sister having no Other Source of Income are wholly dependent upon the Employee. — In the Caliendo case the Supreme Judicial Court affirmed the findings of the Board by which total dependency compensation was awarded the mother and sister of the employee, who had no other source of income except his earnings: The court states: —

The evidence shows that they are residents of Italy, and having become unable by reason of failing eyesight to follow their usual occupations were forced to rely wholly upon him for the means of subsistence. The insurer, however, contends that the 6 or 7 cents a day earned by another sister who was a member of the family, and the remittances from time to time to the mother of various sums by an aunt of the decedent, were sufficient to take the case out of the statute. But the findings, that the remittances were mere gratuities, and that the pittance earned by the sister was hardly sufficient for her own maintenance, and that no part was paid to the dependents who never relied upon either for aid, eliminates those relatives as contributing any dependable sources of support. It being plain on the facts that during his life the mother and sister had no other source of income except his earnings, they were rightly found to be wholly dependent upon the employee, and the rulings requested could not be given.

Permanently Disabled Employee, receiving Partial Compensation, entitled to Total Incapacity Compensation during Shut-down Period. — The court held, in the Septimo case, that the employee was entitled to compensation on the basis of total incapacity for work during a certain period of time, while the plant in which he had been furnished employment was shut down.

The court states: —

The committee of arbitration found that it was probable, considering his injured condition, that he would not have been able to obtain work or to earn anything elsewhere. The record shows that he was seriously crippled and disabled. The photograph, which is annexed to and made part of the report of the Board, shows that he has lost the whole of every finger, except the forefinger of his right hand and the little, or fourth, finger of his left hand. When the grave character of these injuries is considered we cannot say, without the evidence before us, that the finding of total disability for work of the employee was not warranted. It follows that the amount which he would have been entitled to receive for partial incapacity for work becomes immaterial and need not be considered.

Daughter Physically Able to earn, in Fact totally Dependent. — The Board decided as a fact that the daughter of the deceased employee, Herrick, although physically able to earn, was totally dependent upon him for support. The court says: —

That but for her sense of duty, because she thought that her father needed her care, she might have continued to earn enough for her own support, and to be independent of him, cannot be decisive as a matter of law against her claim. The Board well might base its conclusions upon the facts as they were, and not upon what might have been the case if her sense of filial duty had been weaker.

No Appeal from Finding of Board if there is Any Evidence to support it. — In the Buckley case the court states: "There is no appeal from the finding of the Board upon a question of fact where there is any evidence to support it; but where, as here, the evidence is all reported, the question whether it is sufficient to support the finding is one of law and may be revised here." After reviewing the case the court finally adds: "It cannot be said as a matter of law that such a conclusion is erroneous," that is, the conclusion of the Board on the evidence that the claimant was wholly dependent.

Dependency is a Question of Fact unless the Claimant comes within the Conclusive Presumption Clause. — The court held, in the Gallagher case, that a wife who was living apart from her husband at the time of his death for justifiable cause, and who had endeavored in every possible way to secure the support to which she was entitled, was not entitled to be "conclusively presumed to be wholly dependent" upon him for support, deciding that, under such circumstances, dependency is a question of fact. A recent amendment to the act gives a wife who lives apart for justifiable cause the benefit of the "conclusive presumption" clause.

Dependency is a Question of Fact in all but Excepted Cases. — The court held, in the Bentley case, that findings of fact by the Board are not open to revision, and that dependency is a question of fact which must be determined upon evidence of the facts as they existed at the time of the injury. The Board found that the widow, living apart from her husband and not receiving support from him at the time of the injury, was not

entitled to compensation. It found that a minor child, also living apart with her mother, was in fact partially dependent upon the employee, and awarded compensation in accordance with the evidence as to such partial dependency.

The Value of Employee's Board should not be deducted in determining Dependency Status of Claimant. — The court adopted the reasoning of the Board in the Murphy case, in which it was held that "there is no provision in the act which provides for any deduction from an employee's wages when the employee contributes to the dependent all of his wages," and states: —

This statute was the beginning of a new kind of legislation, and was dealing with a class of cases involving an infinite variety of circumstances. The Legislature may well have thought that it was not wise to attempt at first to provide a specific rule for every possible case, but simply to provide a few general rules easily understood and easy of application and, as experience dictated, from time to time to make changes. In the present case the father had a large family which he was legally bound to support, and this he was bound to do, whether the children could help or not. The amount contributed by Walter went to help the father in the support of the whole family. Whether it is wise to distinguish as to the support of the individual members of a family in a case like this, as the insurer suggests, is for the Legislature. We think that the conclusion of the Accident Board is in accordance with the language of the statute.

Release by Employee does not deprive Widow of Right of Recovery after Death. — The employee in the Cripps case had signed a release in consideration of the receipt of a small sum of money, having elected to take damages from the independent wrongdoer rather than to receive compensation under the statute. Later, however, complications due to the original injury developed and he died. The widow, claiming a right of recovery independent of the employee's control, asked for compensation on account of his death. The court says: —

The statute of 1911, chapter 751, is not penal, but is based on the theory of compensation. Primarily its object is to provide, in place of wages which he can no longer earn, the means of subsistence for the employee injured without "serious and willful misconduct" on his part, if he survives, or for the widow, and other dependents, if death ensues either with or without conscious suffering. . . . The right of recovery expressly given to his widow cannot accrue until his death. Having been created for her

benefit, it is independent of his control, and under section 22 can be discharged only by herself where she is the sole dependent, or by those authorized to act in her behalf.

The Word "furnish" in Connection with Medical and Hospital Treatment defined by Supreme Judicial Court. — The Board held, in the Panasuk case, that the insurer must pay the reasonable medical fee of a physician selected by the employee to treat him, unless it makes some degree of active effort to furnish medical attendance, and the court, upholding the decision of the Board, defines the word "furnish," as used in the statute with reference to medical and hospital attendance, as follows: —

The obligation to furnish medical and hospital services for the first two weeks after the injury is imposed on the insurer by the express words of the act. This duty must be performed, or reasonable efforts made to that end, before the statutory obligation is satisfied. "Furnish" means to provide or supply. Its significance may vary with the connection in which it is found. It is used here to describe a duty placed upon an insurer respecting a workman who receives "a personal injury arising out of or in the course of his employment." Such a person manifestly is presumed by the act to be under more or less physical disability, and hence not in his normal condition or ability to look out for himself. The word "furnish" in such connection imports something more than a passive willingness to respond to a demand. It implies some degree of active effort to bring to the injured person the required humanitarian relief. Reasonably sufficient provision for rendering the required service must of course be made. Then either express notice must be given to the employee, or there must be such publication or posting of the information as warrants the fair inference that knowledge has reached the employee. If the insurer has made adequate arrangements for the care of those to whom the duty is owed in the event of injury, and then by conspicuous notices suitably posted in places frequented by the employee, in a language capable of being read by him, has given full information of that fact, and directions as to steps to be taken by an injured person in order to avail himself of these arrangements, a very different question would be presented. This might go a long way toward proving compliance with the requirement of the statute.

Purpose and Scope of Workmen's Compensation Act is to include all Matters arising under it. — The insurer, in the Panasuk case, objected to the taking of jurisdiction by the arbitration committee and Board to the claim of the employee on

account of the nonpayment of the bill of his physician. The court states: —

It is contended that the arbitration committee and the Industrial Accident Board have no jurisdiction to consider this question. That contention is untenable. The purpose and scope of the Workmen's Compensation Act is to include all matters touching the relations between the employer and employee arising under the act. It is a remedial statute and should be given a broad interpretation. All controversies arising between the employee and the employer and the insurer under the terms of the act are to be settled in accordance with the procedure there established.

Finding of the Board on Question of Fact has Weight and Effect of Verdict of Jury. — The Supreme Judicial Court, in the Diaz case, says: —

The contention of the insurance company is that the employee did not suffer any injury which would incapacitate him beyond the first two weeks. But the finding of the Industrial Accident Board on that question of fact has the weight and effect of the verdict of a jury. Clearly, we cannot say that the facts stated in the report do not warrant the finding of the Board as to the extent of the employee's incapacity, especially in view of the report of the duly qualified impartial physician that in his opinion the injured employee was not malingering, and that ten weeks' idleness was not due to dishonesty or laziness or a hope of gain.

Board has Right to leave Case open, pending the Establishing of the Earning Capacity of Employee. — The insurer contended, in the Hunnewell case, that the Board exceeded its authority in making a finding that the employee's total incapacity for work terminated at a certain date "subject to the right of the said employee to compensation on account of partial incapacity for work under section 10, Part II. of the Workmen's Compensation Act, depending upon his ability to earn wages." The Board had made an award on account of partial incapacity for work on the basis of the employee's earning capacity, and the insurer, objecting thereto and claiming an excess of jurisdiction, appealed to the Supreme Judicial Court for relief. The court says: —

This course is justified by the act. . . . There is nothing in the words of our act which prevents the Board from pursuing this course. The procedure should be flexible and adapted to the direct accomplishment of the

aim of the act, with as little formality or hampering restriction as is consistent with the preservation of the real rights of the parties and the doing of justice according to the terms of the act. It is within the power of the Board to decide that for a time compensation shall be suspended but not ended, with reservation to leave to the employee to apply for further payments under the act, provided this course in its opinion is required by the facts.

Insurer may not litigate by Appeal when Decision will not affect its Pecuniary Responsibility. — The Supreme Judicial Court held, in the Janes case, that the insurer has suffered no harm by the finding of the Board, which directs the administrator of the deceased employee to divide the compensation between the guardian of the living minor child and the administrator of the estate of a minor child whose death occurred subsequent to the demise of his male parent. The court says:—

The Workmen's Compensation Act does not contemplate, either in its letter or its spirit, that the insurer may litigate by appeal to this court the proportions of the division of a payment among those claiming to be dependent upon the deceased employee, when the dependents are satisfied, and do not appeal, and when the insurer cannot, by any possibility, be affected in its pecuniary responsibility by any modification permitted by law of the order for payment.

Employment for One Occasion and for Single Day is "Casual." — The Supreme Judicial Court held, in the Gaynor case, that employment for a single day and for one occasion only, was "casual" employment. While this decision is no longer of importance in Massachusetts, because of the striking out of the word "casual" from the act, reference is made thereto because other States except "casual employees" from the operation of the law. The court states: —

The relation between the waiter and the caterer had no connection of any sort with any events in the past. Each was entirely free to make other arrangements for the future, untrammelled by any express or implied expectation of further employment. . . . The conclusion seems irresistible that the employment of the deceased was "but casual" within the meaning of those words in our act.

Later the court held that the above decision was controlling in the Cheevers case.

Supreme Judicial Court defines "with whom she lives." — In the Nelson case the Supreme Judicial Court defines the words "with whom she lives," as used in the statute, Part II., section 7, as follows: —

"With whom she lives" in (a) means living together as husband and wife in the ordinary acceptation and significance of these words in common understanding. They mean maintaining a home and living together in the same household, or actually cohabiting under conditions which would be regarded as constituting a family relation. There may be temporary absences and incidental interruptions arising out of changes in the house or town of residence, or out of travel for business or pleasure. But there must be a home and a life in it. The matrimonial abode may be a roof of their own, a hired tenement, a boarding house, a rented room, or even a room in the house of a relative or friend, however humble or temporary it may be. But it is the situation arising from the existence of a common home, a place of marital association and mutual comfort broken up or put in peril of hardship or extinction by the husband's death, which is protected by the conclusive presumption of dependency established beyond the peradventure of dispute by the statute. Under such circumstances the widow is given the benefit of an irrefutable assumption that she was supported by the husband. The correlative provision in sub-section (b), giving the husband the benefit of a like presumption, confirms this view.

After making reference to the English act and to the recognized benefit to society arising from the living together of husband and wife, the court adds: —

There may be many instances where there is a total dependency, although there is a temporary separation of husband and wife. There may be a physical dissociation and a breaking up of the home, with a definite purpose to resume the normal conditions of married life. The act provides for these cases by requiring dependency to be determined in accordance with the truth. But the words "living together" do not aptly describe such a situation. These words are used in antithesis to living apart. They exclude a condition where there is neither a home nor an actual dwelling together, and where the suspension of this relation is something more than a mere temporary incident of a changing family habitation.

A Farmer may or may not insure, as he elects. — The Supreme Judicial Court upheld the decision of the Board in the Keaney case, in which it was decided that a farmer may or may not, as he chooses, insure any part of or all of his employees under the Workmen's Compensation Act. The court says: —

The Workmen's Compensation Act was not intended to confer its advantages upon farm laborers, or to impose its burdens upon farmers. . . . A farmer employing laborers suffers no harm in not undertaking to become a subscriber under the Workmen's Compensation Act. Hence, it is apparent that a farmer who chooses to avail himself of its terms, and thereby confers the boon of its protection upon his employees, does so on other grounds than those which might actuate the manufacturer or other employer of labor. . . . There appears to be no reason for saying that a farmer may not adopt it if he desires. Any contract of insurance made by him under its terms is valid and enforceable. On the other hand, if he does not desire to make it available for all of his employees, there is no insuperable objection to his undertaking an insurance for a limited portion of them. If there are those, separable from others by classification and definition, whose labor is more exposed or dangerous, or whom he may desire to protect for any other reason, there is nothing in the act reasonably interpreted to show why he may not do so. [The court adds:] If construed to compel farmers to insure for all their laborers if they undertake to insure any of them, the inevitable tendency would be to discourage resort to the act in any respect.

The Importance of the Supreme Judicial Court's Decision in the Young Case. — The Young case, as decided by the Supreme Judicial Court, is important in three particulars: it has been decided again that the Workmen's Compensation Act is constitutional, that the insurer's course in asking for the formation of a committee of arbitration, notwithstanding the objection of the employee, was warranted, and that the failure of a subscriber to insurance to give notice of this fact to his employees does not give such employees a right of action at common law.

With regard to the constitutionality of the act, the court states: —

It is urged that it deprives the plaintiff of her constitutional right to a trial by jury. If that question is presented and insisted upon, undoubtedly an employee has a right to a trial by jury on the point whether the employer was in truth a subscriber under the act, and whether notice had been given by the employee at the time of the contract of hire of an election to rely upon his common-law rights in cases where claim is asserted that such notice had been given. . . . The section in question affects no existing property right. It deals with no property right after it has come into being. It affects a situation which antedates any property right arising out of tort. It simply established a status between subscribers under the act and their employees in the absence of express action by the latter mani-

festing a desire to elect a different status. . . . The employee is not compelled to give up any common-law or constitutional right. It is a matter of choice whether he avails himself of the one or the other. Reasonable provisions are made for the exercise of his election. The section is not open to objection as class legislation, or as denying equal protection of the laws. It applies to all employees alike. . . . The act is constitutional and is not open to criticism in the respects urged by the plaintiff.

Severance of Phalange and Permanent Incapacity of Phalange differentiated. — The court modified the decision of the Board in the Ethier case by holding that the statute, as then in effect, contained no reference to the permanent incapacity of an injured phalange, and held, therefore, that “a construction cannot be adopted placing upon a parity the severance of a phalange with an injury to the phalange not resulting in the permanent incapacity for use of the entire finger.” A recent amendment provides for the payment of “additional” compensation for the permanent incapacity of a phalange.

Plaintiff entitled to recover for Loss caused by Injury to Minor. — The court held, in the King case, that the plaintiff was entitled to recover for the loss caused to herself by the injury to her minor son.

The court says: —

Our decision does not apply to cases where the parent has received any benefit or compensation under the act. Nor do we decide that the plaintiff could recover for medical expenses which had been paid by the insurer, or for her son's services, so far as she had received, or was entitled and able to obtain, for such services the amounts paid therefor to him through his next friend by the insurer. These questions are not presented, for the amount of damages has been agreed upon.

Court has no Power to issue Letters rogatory. — The court decided, in the Martinelli case, that it had no power to issue letters rogatory for the purpose of taking the testimony of witnesses in a foreign country.

The court says: —

It is not within the power of a court, even of general jurisdiction, to issue letters rogatory to obtain testimony to be used before a tribunal over whose procedure and trials it is given no authority until the case itself may be brought before it for review.

Important Decisions of the Board. — Many of the important decisions of the Industrial Accident Board were not taken by appeal to the Supreme Judicial Court, and some of those which were have not been decided to date by that body. Immediately following will be found a summary of many of the important decisions of the Board, a perusal of which will prepare the reader for the study of the complete reports which may be located by reference to the case index.

Frostbite results from Materially Increased Exposure. — It was held, in *Doherty v. Employers' Liability Assurance Corporation, Ltd.*,¹ that frostbite, resulting from materially increased exposure, due to the shoveling of coal on a very cold day, was covered under the statute.

Compensation due under Statute a Vested Interest. — The dependent mother, having died since the hearing before the committee of arbitration, the Board held, in *Murphy v. Ætna Life Insurance Company*,¹ that the compensation due her under the statute is a vested interest and passes to her estate.

Incapacity due to Compulsory Vaccination. — The employee was vaccinated as the result of a requirement by the board of health, in the factory of his employer. Infection, followed by ulcer, resulted from the vaccination, and the employee was incapacitated for work for a period of nine weeks. Held, in *Fewore v. Employers' Liability Assurance Corporation, Ltd.*,¹ that he was entitled to compensation.

Tips or Gratuities are Earnings. — The employee, in *Hatchman v. New England Casualty Company*, was a waiter, and received in addition to his wages and meals certain tips or gratuities from the patrons of the hotel. Held, that tips or gratuities are earnings, and that employee's compensation should be based upon all his earnings.

Compensation awarded for Certain Period, after which All Incapacity will be due to Natural Effects of Pre-existing Disease. — In *Jones v. Fidelity and Deposit Company of Maryland*,¹ compensation was awarded for a certain period, after which it was held that all incapacity will be due to the natural effects of a pre-existing disease.

Loan of Employee does not change Employment Status. —

¹ Appealed to Supreme Judicial Court.

The employee was assigned, or loaned, to assist a contractor to erect a tank for the use of the subscriber, and it was held, in *Steiner v. Casualty Company of America*, that his status of employment had not been changed by reason of this assignment.

Employment Status unchanged by Another's Agreement to furnish Financial Aid. — The subscriber, in *Schuman v. Employers' Liability Assurance Corporation, Ltd.*, needed and received financial assistance from another, and it was held that there was no change in the employment status of the deceased employee.

Insanity having Causal Relation to Injury. — The employee received a personal injury by reason of the blistering of his hands while using a wheelbarrow; the wound became infected and two operations were performed; because of the injury, operations and suffering the previously impaired nervous state of the employee was accelerated to the point of insanity. Held, in *Whalen v. United States Fidelity and Casualty Company*, that the employee was entitled to compensation.

Insanity and Suicide have Causal Relation to Injury. — The employee received a personal injury by reason of the spattering of molten lead into his eye, causing total loss of vision in the injured eye. Subsequently, in a fit of insanity, he threw himself from the hospital window and received injuries which caused his death. Held, in *Sponatski v. Standard Accident Insurance Company*,¹ that the employee's widow was entitled to compensation.

Personal Injury causes Nephritis and Blindness. — It was held, in *Cooper v. Massachusetts Employees Insurance Association*, that the nephritis and blindness which incapacitated the employee were caused by the injury and electrical shock which he received while performing his work for the subscriber.

Personal Injury lights up Inflammatory Condition. — The employee received a personal injury by reason of a blow from a 12-pound sledge hammer which he was using, which lighted up an inflammatory condition which had been described as a mild chronic osteomyelitis. This lighting up of the old condition necessitated amputation of the leg. Held, in *Gariella v.*

¹ Appealed to Supreme Judicial Court.

American Mutual Liability Insurance Company, that this was a personal injury under the statute.

Traumatic Cataract to Right Eye sympathetically affects Left Eye. — Compensation was awarded, in *Stachuse v. Fidelity and Casualty Company of New York*, because of the sympathetic affection of the left eye, by reason of a condition of traumatic cataract of the right eye, due to a personal injury arising out of the employment.

Heart Lesion grows progressively Worse dating from Injury. — In *O'Hare v. Employers' Liability Assurance Corporation, Ltd.*, the condition of heart lesion grew progressively worse, dating from and by reason of the occurrence of the injury, and compensation was awarded.

Lobar Pneumonia follows Reduced Powers of Resistance. — The employee, in *Merritt v. Travelers Insurance Company*, died from lobar pneumonia, due to exhausted vitality and reduced powers of resistance, following a personal injury arising out of and in the course of his employment, and compensation was awarded the widow.

Hypostatic Pneumonia follows Injury and Operation. — The employee, in *Cantwell v. Travelers Insurance Company*, slipped and fell while employed in the bottling department of the subscriber, dislocating the clavicle. He was operated upon three days later, and died of hypostatic pneumonia caused by the weakening of his system by reason of the operation. Held, that his widow was entitled to compensation.

Previous Condition of Tuberculosis not aggravated by Exposure. — The Board, in *Fralin v. United States Casualty Company*, found that the condition of tuberculosis from which the employee was suffering was not materially aggravated or accelerated by his exposure during his employment in an unoccupied house.

Condition of Diabetes has no Causal Connection with Injury. — It was held, in *Gacuzzi v. Employers' Liability Assurance Corporation, Ltd.*, that the sudden wrench and strain sustained by the employee, with the resulting fall, did not materially accelerate an incipient condition, and therefore that there was no causal relation between the injury and the diabetes.

Condition of Dementia Præcox has no Relation with Injury. — The employee received a personal injury by reason of a fall to the floor from the bench upon which he was working, and later became incapacitated for work because of a condition of dementia præcox. Held, in *Lederman v. Standard Accident Insurance Company*, that there was no causal relation between injury and dementia præcox.

Chain of Causation broken by a Novus Actus Interveniens. — The evidence, in *McCarthy v. London Guarantee and Accident Company, Ltd.*,¹ showed that the employee received a personal injury which necessitated the amputation of the thumb and fingers of his right hand. Later, alcoholic insanity developed and totally incapacitated him. Held, that the employee was not entitled to compensation.

Pin Prick has no Relation to Death from Pneumonia. — It was held, in *Currie v. Royal Indemnity Company*, that a pin prick and subsequent sepsis had no causal relation with the death of the employee from pneumonia at a later date.

Cerebral Hemorrhage, not Injury, causes Death. — The employee, in *Birnie v. Contractors Mutual Liability Insurance Company*, died from cerebral hemorrhage, having no causal connection with personal injury. The evidence of fellow employees who witnessed the occurrence was wholly at variance with the weight of the medical testimony. Impartial autopsy shows that there was no causal relation between injury and death, and committee so decided.

Cancer from which Employee dies has no Relation to Injury. — The medical evidence showed that the condition of cancer from which the employee died had no relation to the personal injury received by the employee by reason of a blow from a timber, and it was so held in *McElligott v. Frankfort General Insurance Company*.¹

Bronchitis and Intestinal Tuberculosis cause Incapacity Independent of Injury. — The employee fell ten feet, striking on his left arm near the elbow. Afterwards he felt, in addition to trouble in arm and shoulder, a soreness in the left side of the chest. Subsequently, a condition of bronchitis and intestinal tuberculosis developed. Held, in *Swartz v. Casualty Company*

¹ Appealed to Supreme Judicial Court.

of America,¹ that there was no causal relation between the diseases which incapacitated him and the injury.

Injury occurs while entering Place of Employment. — In the case of *Driscoll v. London Guarantee and Accident Company, Ltd.*,¹ it was held that an employee who was required to use the flight of stairs upon which she received the injury in order to enter her place of employment was entitled to compensation.

Employee voluntarily leaves Work to assist Fellow Employee. — The Board held, in the case of *Malewicki v. American Mutual Liability Insurance Company*, that the widow of an employee who received a fatal injury by reason of the voluntary leaving of his own work to assist other workmen in loading a heavy heater coil on a flat car was entitled to compensation.

Street Cleaner receives Injury by Reason of running away of a Horse. — The Board awarded compensation to the widow of a street sweeper who received a fatal injury by reason of the running away of a horse, it being held that the duties of his occupation especially exposed him to the risks and dangers of the street. This was the case of *Lowney v. City of New Bedford*.

Employee receiving Injury while assisting Another in removing Paint placed on Spindle in Spirit of Play. — The Board held, in *McHenry v. American Mutual Liability Insurance Company*,¹ that a personal injury received by an employee while assisting another employee to remove paint placed on a spindle in a spirit of play did not arise out of or in the course of her employment. The painting was done just before lunch time, and the removal of the paint was performed during the luncheon hour. The Board stated that it was neither incidental to said employment, nor any part of the duty of the said employee, to paint spindles or to remove paint from such spindles.

Fatal Injury occurs after Employee makes Unsuccessful Application for Work. — The evidence in the case of *Ganley v. Employers' Liability Assurance Corporation, Ltd.*, shows that the employee, a longshoreman, had finished his work at 7 o'clock on the night before the fatal injury occurred. He made an unsuccessful application for employment the next day, and

¹ Appealed to Supreme Judicial Court.

while crossing the railroad tracks was killed by a passing train. Held, that the injury did not arise out of and in the course of his employment.

On the Premises for Purposes of his own. — The employee, in the case of *Lynn v. Employers' Liability Assurance Corporation, Ltd.*, was on the premises for purposes of his own at the time the injury occurred, and it was held that no compensation was due under the statute.

Fibroid Tuberculosis, or Stone Grinder's Phthisis, causes Death of Employee. — It was held by a committee of arbitration, in the case of *Kalanquin v. Travelers Insurance Company*, that the occurrence of fibroid tuberculosis, or "stone grinder's phthisis," by reason of the inhaling of small particles of stone and dust, is a personal injury arising out of and in the course of the employment.

Unusual Degree of Strain causes Occupational Neurosis. — The employee, in the case of *Lee v. Employers' Liability Assurance Corporation, Ltd.*, was incapacitated for work by reason of a condition of occupational neurosis, due to the unusual degree of strain upon certain groups of muscles for a long period of time at his trade of cigar maker. Compensation was awarded for the incapacity for work resulting thereby.

Employee unable to perform Work provided. — The employee, in *Krulla v. Casualty Company of America*, was furnished certain employment which he was unable to perform, and was thereafter unable to obtain any employment which he could perform, because of the incapacity due to the injury. Held, that he was entitled to compensation on account of total incapacity.

Unreasonable Refusal to perform Work offered. — The employee, on several occasions, refused to attempt to perform work offered him by the insurer, and it was held, on the evidence, in *Asdoorian v. Massachusetts Employees Insurance Association*,¹ that his refusal to accept such employment was unreasonable.

Incapacity for Work due to Unreasonableness of Employee in refusing to permit of Performance of Operation. — The em-

¹ Appealed to Supreme Judicial Court.

ployee, in *Nicotero v. Globe Indemnity Company*,¹ refused to permit the performance of an operation for the removal of the affected eye, and it was held that such refusal was unreasonable, and that all incapacity for work was due to his unreasonableness and not to the injury.

One-eyed Employee loses Vision in Other Eye. — The employee, in *Morrison v. Fidelity and Casualty Company of New York*, received a personal injury which destroyed the vision in his left eye, the vision in right eye having been destroyed previously by reason of a cataract. Held, that he was totally incapacitated for work because of the injury.

Employee having no Useful Vision in Injured Eye not entitled to Additional Compensation. — The employee, in *Eldredge v. Employers' Liability Assurance Corporation, Ltd.*, did not have useful vision in the injured eye at the time of the occurrence of the injury. The accident destroyed any possibility of restoring sight to this eye. Held, that no additional compensation was due on account of the specific injury received.

Employee receives Personal Injury by Reason of Assault by Irate Customer. — The employee, in the case of *O'Connor v. London Guarantee and Accident Company, Ltd.*, had been instructed not to deliver merchandise to a certain customer because of his delinquency in paying his debts. This customer, having paid his bill, received the goods which he had ordered and had occasion to pass the employee. The customer called the employee a name and struck at him as he passed. The employee parried the blow, and the customer laid hands on him, the former resisting, with the result that he received a personal injury which caused him to be totally incapacitated for work. Held, that the injury arose out of and in the course of his employment, on the ground that the risk of assault by an irate customer, to whom credit had been refused, was a peril involved in his contract of service.

Fatal Injury arises out of Quarrel precipitated by Deceased Employee. — It was held in the case of *Malloy v. Fidelity and Casualty Company of New York* that a fatal personal injury,

¹ Appealed to Supreme Judicial Court.

arising out of a quarrel which was precipitated by the deceased employee, was not covered by the statute.

Dependent Daughter physically incapacitated for Earning. — The claimant, the daughter of the deceased employee, in the case of *Carter v. Travelers Insurance Company*,¹ lived with her mother, who was separated from her father, and all her support came from her father. She was in poor health and was physically incapacitated for earning. Held, that she was totally dependent upon the employee for support.

Father totally Dependent despite Fact that he assisted in conducting Unprofitable Business. — The employee contributed all of his earnings to his mother, who was the custodian of said earnings for the benefit of the family. The father, an invalid, assisted in conducting an unprofitable store, and it was held, in *De Pasquale v. Employers' Liability Assurance Corporation, Ltd.*, that he was wholly dependent upon the earnings of the deceased employee for support.

Partial Dependent receives Entire Earnings of Employee. — It was held, in *Devaney v. American Mutual Liability Insurance Company*, that the partial dependent who received all the earnings of the employee was entitled to full compensation.

Traveling Salesman receives Injury while on Way Home. — A traveling salesman intended to meet a customer at a certain place, but while en route changed his mind and decided to go home. He received an injury while on the way home, after having passed the point at which he expected to meet his customer. Held, in *Muir v. Ocean Accident and Guarantee Corporation, Ltd.*, that he was not entitled to compensation.

Inference of Fact drawn by Committee. — The evidence shows that it was the custom of the employee to warn the stablemen of the arrival of each team by ringing a bell, and it was often his habit to look out of the window to notice whether the team had been admitted. The body of the employee was found underneath the window from which the employee looked to note the arrival and admission of the teams, and it was held by the committee of arbitration, in the case of *O'Brien v. Casualty Company of America*, that the injury arose out of and in the course of the employment.

¹ Appealed to Supreme Judicial Court.

Evidence leaves Cause of Death of Employee in Doubt. — The evidence, in the case of *Murphy v. Employers' Liability Assurance Corporation, Ltd.*,¹ left the matter of the cause of death in doubt, and the Board held that the widow of the employee was not entitled to compensation.

Board has Authority to review and cancel Agreement in Regard to Compensation. — In the case of *Gertz v. Royal Indemnity Company* the Board ruled that it had authority to review an agreement previously approved, and cancelled same in view of the evidence, which showed that it was based on the erroneous assumption that the employee's loss of vision was due to a personal injury arising out of and in the course of the employment.

Signing of Settlement Receipt does not bar Proceedings by Employee to determine Right to Reimbursement on Account of Expenditure for Medical Services. — The insurer objected to the taking of jurisdiction by a committee of arbitration in the case of *Ducy v. American Mutual Liability Insurance Company*, claiming that the signing of a settlement receipt by him acted as a bar to proceedings to determine his right to obtain payment of the amount expended for medical services under the statute. The committee ruled that it had jurisdiction, and awarded the employee the sum of \$18 to cover his expenditure for medical services under the statute.

Insurer questions Right to reopen Case after Approval of Settlement Receipt. — It was held, in *Jones v. Fidelity and Deposit Company of Maryland*,¹ that the right of an employee to further compensation was not barred by the signing of a settlement receipt, if there was evidence of a recurrence of incapacity for work by reason of the injury.

Deputy Surveyor of Lumber is a Public Official and not an Employee. — A committee of arbitration held, in *Emerson v. Massachusetts Employees Insurance Association*, that a deputy surveyor of lumber, appointed by the surveyor-general, whose duties were fixed by statute and whose salary was fixed by law, was not an "employee" under the Workmen's Compensation Act.

¹ Appealed to Supreme Judicial Court.

Full Reports follow. — Full reports of all the cases referred to in this introduction, as well as the reports of many other interesting cases, will be found in the pages which follow.

INDUSTRIAL ACCIDENT BOARD.

JAMES B. CARROLL, *Chairman.*

DUDLEY M. HOLMAN.

DAVID T. DICKINSON.

EDW. F. MCSWEENEY.

JOSEPH A. PARKS.

ROBERT E. GRANDFIELD, *Secretary.*

The Commonwealth of Massachusetts.

INDUSTRIAL ACCIDENT BOARD.

**REPORTS OF CASES UNDER THE WORKMEN'S COM-
PENSATION ACT, JULY 1, 1913, TO
JUNE 30, 1914, INCLUSIVE.**

CASE No. 9.

ARTHUR HOWARD, *Employee.*

EDISON ELECTRIC ILLUMINATING COMPANY, *Employer.*

MASSACHUSETTS EMPLOYEES INSURANCE ASSOCIATION, *Insurer.*

EMPLOYMENT NOT CASUAL. EMPLOYEE WHO WAS ENGAGED TO TRIM TREES FOR ELECTRIC LIGHT COMPANY ORDERED BY FOREMAN TO TRIM A TREE ON CHURCH PROPERTY. INSURER CLAIMS THIS IS CASUAL EMPLOYMENT AND NOT IN THE USUAL COURSE OF THE BUSINESS OF THE SUBSCRIBER. SUPREME JUDICIAL COURT HOLDS THAT IT WAS NO PART OF THE DUTY OF THE EMPLOYEE TO INQUIRE INTO THE RIGHT OF HIS EMPLOYER TO TRIM ANY PARTICULAR TREE. COMPENSATION AWARDED.

The insurer claimed that the employee was not entitled to compensation because he received his injury while "trimming" a tree on church property, alleging that this work was "casual" and not in the usual course of the business of the subscriber. The evidence showed that the workman was engaged by a representative of the subscriber and directed to perform such work as the foreman required. The foreman, who also was the tree warden of the town of Stoughton, ordered the employee to "trim" the tree upon which the injury occurred.

***Held*, that the employee was entitled to compensation.**

Review before the Industrial Accident Board.

***Decision.* — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.**

Appealed to Supreme Judicial Court.

***Decision.* — The Supreme Judicial Court affirms the findings of the Industrial Accident Board.**

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Arthur Howard *v.* Massachusetts Employees Insurance Association, this being case No. 9 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Joseph A. Parks, representing the Industrial Accident Board, Arthur L. Holmes of Stoughton, representing the employee, and R. G. Whelden of Whitman, representing the insurer, heard the parties at the Selectmen's Room, Town Hall, Stoughton, Mass., Monday, Oct. 6, 1913, at 1 P.M.

The question was, In whose employ was the injured employee, Arthur Howard, at the time he met with the accident on Aug. 1, 1912? It was agreed that his average weekly wages were \$12.

Arthur Howard, the injured man, testified that he was hired by Mr. Mattau to work under William Kennedy, as foreman, and to clip off dead overhanging limbs of trees in the town of Stoughton; that when Mr. Mattau introduced him to Mr. Kennedy he said, "You go with this man and do what he says;" that while following out these instructions, on Aug. 1, 1912, while up a tree cutting off dead limbs, he sawed off one limb and went to reach for another, when Kennedy said, "Don't cut that one; leave it," and he started to come down. He stated, "And that's about all I know about it." He further testified that he had had no dealings with the town of Stoughton in regard to his work whatever; that he always got his wages from the Edison Electric Company; and that he considered that the company was his employer.

Edward C. Mattau, superintendent of the Gas and Electric Company of Stoughton, testified that Mr. Howard went to work on July 22, 1912, for him. On the morning of August 1, when Mr. Kennedy was going to work, referring to the trees he wished to have trimmed, Mr. Kennedy said, "When I am trimming around the church, there is a dead limb in front I would like to take off." Mr. Mattau replied that he could

take it off. Mr. Kennedy was to supervise the trimming of the trees and also act as foreman of the gang of workers; this he was not doing for the town of Stoughton, but for the Edison Electric Illuminating Company. Whenever trees were to be trimmed they hired Mr. Kennedy to act as foreman and to see that the work was done properly.

Walter A. Forbush, superintendent of the distribution for the Edison Electric Illuminating Company, testified that he considered Mr. Howard an employee of the Edison Company at the time he met with the accident; that Kennedy was Mr. Howard's foreman, and in obeying his orders he was obeying the rules of the Edison Electric Illuminating Company.

William P. Kennedy, tree warden for the town of Stoughton for the last twelve years, testified that he had supervised the work of the Edison Electric Illuminating Company off and on for four or five years. During the latter part of July and the first of August, 1912, he supervised the trimming of certain trees for the Edison Company, and Mr. Howard was with him at the time. He told Mr. Mattau that there was a tree in front of the church that needed some trimming, and that he ordered Howard to cut that limb off in his capacity as an employee of the Edison Company; that he considered it within his power to take an employee of the Edison Company to trim trees around the town if he had permission from the company. He further testified that Howard was paid by the Edison Company, and that Howard considered him, Kennedy, his foreman in the trimming of the trees.

James F. Barry, a fellow employee of Howard, working with him on the morning of the accident, testified that he heard Mr. Kennedy say, "There are a couple of limbs on that tree that have to come off." He saw Howard sawing off one limb and start to reach for the other. The bark of the tree was slippery and he fell.

Counsel for the insurer argued that, inasmuch as the said employee was at the particular moment of the injury engaged in lopping off a dead limb in front of the church, he was not in the employment of the subscriber, the Edison Electric Illuminating Company, but in the employment of the town of Stoughton, William P. Kennedy, foreman for said subscriber, being also the tree warden of the said town of Stoughton.

The committee of arbitration finds that there is no merit to this claim, the employee, the said Arthur Howard, being employed by the said subscriber and under the control and direction of a person exercising superintendence, and that while carrying out the instructions of his foreman, the said William P. Kennedy, he was in the employ of the said subscriber, the said foreman having authority from the proper official for the performance of the particular work subsequent to the accomplishment of which the employee received the injury.

The committee of arbitration, therefore, finds on the evidence that Arthur Howard received an injury arising out of and in the course of his employment on Aug. 1, 1912; that at the time of the injury he was an employee of the Edison Electric Illuminating Company, insured by the Massachusetts Employees Insurance Association; and that he is, therefore, entitled to reasonable medical and surgical attendance from August 1, the date of the injury, up to and including August 14; and to compensation from Aug. 15, 1912, to Oct. 6, 1913, that is, for fifty-nine and five-sevenths weeks, at the rate of \$6 per week, being half his average weekly wage, amounting to \$358.29, said compensation to be continued during his incapacity for work in accordance with the provisions of the act.

JOSEPH A. PARKS.

ARTHUR L. HOLMES.

RICHARD G. WHELDEN.

*Findings and Decision of the Industrial Accident Board on
Statement of Agreed Facts.*

This case came before the Industrial Accident Board on Thursday afternoon, April 2, 1914, in accordance with the following decree from the Superior Court remanding the case "for such amendment as the parties desire:" —

THE COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

SUPERIOR COURT.
No. 76636.

ARTHUR HOWARD, *Employee.*

EDISON ELECTRIC ILLUMINATING COMPANY, *Employer.*

MASSACHUSETTS EMPLOYEES INSURANCE ASSOCIATION, *Insurer.*

I hereby certify that the above entitled proceeding was entered in this court by the insurer on the third day of December, A.D. 1913; that thereafter, on said day, the following decree was entered by the court:—

DECREE.

This proceeding, which was under the Workmen's Compensation Act, so called, being chapter 751 of the Acts of the year 1911, as amended, to enforce a decree of the Industrial Accident Board, came on to be heard and was presented by counsel; and it appearing that the decision of said Board is that the average weekly wages of the injured employee were \$12 a week, and that the said employee is entitled to compensation from Aug. 15, 1912, to Oct. 6, 1913, that is, for a period of fifty-nine and five-sevenths weeks, at the rate of \$6 per week, amounting to \$358.29, said compensation to be continued during his incapacity for work, in accordance with the provisions of the act; and that by virtue of the provisions of section 11 of Part III. of chapter 751 of the Acts of the year 1911 this court shall enter such decree as the law requires on the facts found by said Board, it is—

Ordered, adjudged and decreed, that the said Massachusetts Employees Insurance Association, insurer, pay to Arthur Howard compensation at the rate of \$6 per week for the period between Aug. 15, 1912, and Oct. 6, 1913, that is, for fifty-nine and five-sevenths weeks, amounting to \$358.29, said compensation to be continued during his incapacity for work in accordance with the provisions of the act.

DEC. 3, 1913.

C. F. J.

By the Court,

HENRY E. BELLEW,
Assistant Clerk.

I further certify that on the sixth day of December, A.D. 1913, the insurer filed an appeal to the Supreme Judicial Court; that on the second day of March, A.D. 1914, the following rescript was received from the Supreme Judicial Court:—

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court, viz., appeal discharged and case remitted to the Superior Court for such amendment as the parties desire to make.

I further certify that on the twenty-sixth day of March, A.D. 1914, the following motion was filed and allowed by the court:—

MOTION TO REMAND CASE.

Now comes the defendant in the above entitled action and moves that the above case, which was remanded by the Supreme Judicial Court to the Superior Court for such amendment as the parties desired to make, be remanded by this court to the Industrial Accident Board.

CURRIER, YOUNG & PILLSBURY,
Attorneys for the Defendant.

We request that the above motion be granted.

READING, PATTEN & MARDEN,
Attorneys for the Plaintiff.

And that on said twenty-sixth day of March said proceeding was remanded to the Industrial Accident Board, in accordance with the order of court.

Witness my hand and the seal of said Superior Court, at Boston, in said county and Commonwealth, this thirty-first day of March, A.D. 1914.

(Seal)

EDMUND S. PHINNEY,
Assistant Clerk.

The parties submitted the following statement of agreed facts to the Board: —

THE COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

INDUSTRIAL ACCIDENT BOARD.

ARTHUR HOWARD *v.* MASSACHUSETTS EMPLOYEES INSURANCE ASSOCIATION.

Statement of Agreed Facts.

Arthur Howard of Stoughton, Mass., was injured on Aug. 1, 1912. He had been employed since July 22, 1912, by the Edison Electric Illuminating Company of Brockton, and his employment was as a tree trimmer for the company. The foreman of this work for the Edison Company was William P. Kennedy. On the morning of Aug. 1, 1912, the trees on which trimming was to be done were wet because of a heavy rain the night before. On that morning, Howard got the team in which the tree trimmers went around to their work, and went to Kennedy's house and got Kennedy. While they were waiting to begin work another tree trimmer employed by the Edison Company, one Osborne, joined them. Rain then began again. When the rain had ceased, Kennedy, Howard and the other men drove off, following the lines of the Edison Company and inspecting said lines, and did no trimming. After going to the end of the line they came back to the corner of School and Canton streets in the town of Stoughton. Kennedy then said that there were some dead limbs upon a tree located inside the sidewalk, on the lawn of the Catholic Church. There were no wires of the Edison Company through the tree, or on that side of the street. Kennedy told the men to climb the tree and lop off those dead limbs. One of the men took a ladder belonging to the Edison Company and placed it against the tree. Howard, with two of the other men, ascended the tree. While they were engaged in the work of lopping off the limbs Howard slipped and fell from the tree, and was injured. This injury totally incapacitated him for work.

The purpose of the Edison Company in employing men to trim trees was to keep its wires clear. The Edison Company had been in the habit of employing the tree warden of the town of Stoughton as foreman over

its gang of tree trimmers, because the company is not allowed to trim any shade trees in the town unless the tree warden be there to supervise such trimming. The company is obliged to do this trimming at least once a year to keep its wires clear.

The tree warden of the town of Stoughton is elected. Mr. William P. Kennedy had held the office for about twelve years. From two to five years he had been supervising the trimming work of the Edison Company. While supervising this work Kennedy was an employee of the company, and acted as the foreman in charge of the company's men who were engaged in trimming trees. The Edison Company paid Kennedy \$3 per day. The Edison Company did not employ Kennedy as tree warden, but they did employ him because he was tree warden. Kennedy did not hire or discharge the men who worked under him, but supervised the work, saw that it was done properly and to his satisfaction, and the Edison Company looked to him to see that the men were kept working. Kennedy reported to Mattau, the company's superintendent, any man who was not satisfactory.

Howard had worked for Kennedy off and on for three or four years, in Kennedy's official capacity as tree warden. Kennedy introduced Howard to Mattau, the local superintendent of the company, as a good man who had worked for him several years, off and on. On July 22, Mattau, acting on behalf of the company, engaged Howard to work for the Edison Company. At that time Mr. Mattau told Howard to go with Kennedy and do what he (Kennedy) told him to do.

Howard was hired by Mr. Mattau, acting for the Edison Company, could have been discharged by him, and received his pay from the company. Neither Kennedy nor Howard was paid, or expected to be paid, by the town of Stoughton for the work they were doing on the day of the accident.

Kennedy's duty, while engaged in the work of the Edison Company, was to trim trees through which their wires ran. Howard's duty, while engaged on the work of the Edison Company, was to obey Kennedy's orders.

While Kennedy was engaged in trimming the tree on the lawn of the church where Howard was injured, he was not doing it for the benefit of the Edison Company, but because he thought the dead limbs were dangerous. A day or two before the accident Kennedy had told Mr. Mattau, the company's superintendent, that there were one or two dead limbs on a tree near the church which he would like to have cut off when the men got around there. Mr. Mattau said, "Go ahead and do it." The tree referred to was the tree from which Howard fell, and the limbs were those which he was removing when he fell. Mr. Mattau testified that he gave this permission with the backing of the company, as superintendent. Mr. Kennedy testified that when he ordered the men to go up the tree he gave the order as an employee of the Edison Company. He further testified that he did not think he gave orders to Howard in particular, as distinguished from the other men, to go up the tree, but that he did not

remember. Howard testified that Kennedy gave the order to trim the tree to the whole gang of tree trimmers, and that he believed that he had to obey Kennedy's orders or "get through." Howard further testified that Kennedy said to him, "You take one side of the trees, and I'll take the other."

Howard's average weekly wages were \$12.

The Edison Electric Illuminating Company of Brockton is insured against its liability under the Workingmen's Compensation Act with the defendant Massachusetts Employees Insurance Association.

READING, PATTEN & MARDEN,
for the Plaintiff.

CURRIER, YOUNG & PILLSBURY,
Attorneys for Defendant.

The Industrial Accident Board finds the facts as set forth in the statement of agreed facts. It further finds that said Arthur Howard received an injury arising out of and in the course of his employment on Aug. 1, 1912; that at the time of the injury he was an employee of the Edison Electric Illuminating Company, insured by the Massachusetts Employees Insurance Association; and that he is therefore entitled to reasonable medical and surgical attendance from August 1, the date of the injury, up to and including August 14; and to compensation from Aug. 15, 1912, to April 2, 1914, that is, for eighty-five weeks, at the rate of \$6 per week, being half his average weekly wages, amounting to \$510, said compensation to be continued during his incapacity for work in accordance with the provisions of the act.

Said findings are made in place of and in substitution for those previously made in this case.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

Decree of Supreme Judicial Court on Appeal.

HAMMOND, J. Upon the statement of agreed facts the Industrial Accident Board might have found that Howard received his injury while engaged in trimming a tree; that in this trimming he was acting under the order of Kennedy; that Kennedy in giving the order was acting under the order of

Mattau, the superintendent of the electric company; that Mattau was acting as such superintendent in giving the order, "with the backing of the company," or, in other words, that at the time Howard received his injury he was acting in obedience to the order of the electric company given to him through Mattau and Kennedy, its duly authorized officers or agents; that the town of Stoughton was in no way engaged in this work; that there was no "lending" of Howard to the town by the company; and that Howard when hurt was doing work as an employee of the company and that he so supposed.

The insurer contends that even if Howard was acting as an employee of the company, still the business of trimming this tree was casual and not in the usual line of his work. In support of this it is urged that he was employed as a tree trimmer of the company; that the purpose of the company in employing men to trim trees "was to keep its wires clear;" and that the company had no interest in trimming trees except those through which its wires were run.

By St. 1911, c. 751, Part V., § 2, the statute under which this suit is brought, the word "employee" is defined to "include every person in the service of another under any contract of hire, express or implied, oral or written, except one whose employment is but casual, or is not in the usual course of the trade, business, profession or occupation of his employer." In the present case Howard was employed to trim trees, and was to receive his orders from the company through Kennedy. It was no part of his business to inquire into the right of the company to trim any particular tree. He was to receive his orders from Kennedy and to obey them. At the time he was hurt he was doing what he had been hired to do. The work was not casual.

Nor was it outside the "usual course of the trade, business, profession or occupation" of the company. These words in the statute must be construed reasonably, and we are of opinion that they should be held inapplicable to a case like this, where the employee is engaged in the business for which he was hired and has no reason to think there is any change in the business, and where there is no change of employer.

Decree affirmed.

CASE No. 31.

ANNIE M. FORSELL, ADMINISTRATRIX OF THE ESTATE OF ALVIN R. NELSON, *Employee*.

BAY STATE STREET RAILWAY COMPANY, *Employer*.

MASSACHUSETTS EMPLOYEES INSURANCE ASSOCIATION, *Insurer*.

SUPREME JUDICIAL COURT DECIDES THAT DEPENDENCY OF WIDOW, LIVING APART FROM HER HUSBAND AT THE TIME OF THE INJURY, SHOULD BE DETERMINED AS A QUESTION OF FACT.

The sole question at issue in this case was whether the widow of the employee was entitled to compensation as a dependent. She and her husband had not lived together since July, 1911, the injury occurring July 1, 1912. The evidence indicated that there had been a quarrel; that she left him; that he came and asked her to return; that he had given her money when she left for Nova Scotia, telling her he would support her and the child; that he was planning to return to Nova Scotia in September, and that there had never been any talk of legal separation or divorce.

Held, that the widow was wholly dependent upon him and entitled to compensation. Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to Supreme Judicial Court.

Decision. — The Supreme Judicial Court reverses the findings of the Industrial Accident Board.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Annie M. Forsell, administratrix, *v.* Massachusetts Employees Insurance Association, this being case No. 31 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Dudley M. Holman of the Industrial Accident Board, chairman, Charles H. Bowen, representing the insurer, and John B. Holt, Esq., representing the employee, being duly sworn, heard the parties and their witnesses at the Hearing Room of the Industrial Accident Board, Pemberton Building, Boston, Mass., Wednesday, Jan. 22, 1913, at 10 A.M.

It appears from the evidence that Alvin R. Nelson, age twenty-six, 58 Myrtle Street, Somerville, was employed by the

Bay State Street Railway Company as a conductor of an electric car at Revere, Mass.; that on Monday, the first day of July, 1912, at 10.05 P.M., he received injuries to his head from getting off his car, going around the rear end of it, and stepping in front of a moving car on the opposite track. He was thrown to the street, picked up unconscious, and died on his way to the Frost Hospital at Chelsea, Mass. We find on the evidence submitted that his average weekly wages were \$15.75, and that his injury arose out of and in the course of his employment. The above-named Annie M. Forsell has been duly appointed administratrix of the estate of the deceased.

The question raised by the insurance company is that of dependency. Nelson was a married man, with a child about three years of age, living with her mother in Nova Scotia, and the insurance company raised the issue that the latter was not living with her husband at the time of his death nor supported by him, and that she was not entitled to be considered a dependent, as defined in clause (a) of section 7, Part II.

We find on the evidence submitted that Mrs. Alice E. Nelson was the widow of the deceased. They were married Dec. 25, 1907. She was twenty-one years of age at that time, and her husband was the same age. They lived immediately after their marriage in Truro, N. S., for about six months, when Mr. Nelson decided to come to Boston, and she went home to East Rawdon about May 24, 1908. There was no quarrel or difficulty of any kind at that time. He gave her about \$20 before he went away.

He remained in Boston about six months, and then she came to Boston and joined him in October, 1908. He had worked at several jobs until after she came to Boston, and he did not send her any money during that time, nor did he contribute to her support in any way. They stayed there until the following May, when he insisted on going to Chicago with a friend. The wife remonstrated, but in vain, and when he went to Chicago she returned home to her parents. He joined her again at East Mountain, N. S., in September. He did not send her any money while he was away this time, but he did give her about \$25 before he went away.

In September he took a farm at Manganese Mines, about 75 miles from her home in Nova Scotia, and they lived there

about two years. It was a small farm with the usual stock. The little girl was born Aug. 3, 1910, while they were living at the farm. Her health was somewhat poor after the child was born. She had been accustomed to help her husband with the farm work. He had not previously been familiar with farm work, and did not like it very well. They had discussions from time to time about the work and they did not agree about the treatment of the stock. She thought he was "too rough" about the stock, and he got dissatisfied, thinking she might do more work than she did in the matter of farm chores. This was after the child was born, and she did not feel able to do such work.

On July 4, 1911, he ordered her to feed the calves and she refused to do so. He said that if she would not do it he would get somebody else to do it, and she said that he could; and then he told her that she could take her clothes and go if she would not do so. There was no further talk. About an hour or so afterwards she took her baby and her clothes and went to her sister's at East Mountain. A few days after that he came to her and wanted her to come back to him, but said that he was not going to stay there; that he was coming to Boston, because he wished to get out of the scandal and talk in that vicinity growing out of his treatment of the stock and their separation, and that he intended to come to Boston. She said in her testimony, given before the committee in Boston, "I told him I would rather not come to Boston, as I did not like living up here." He left her, and again in three or four days afterwards went to see her, and wanted to know if she were coming to Boston with him. She said she thought it would be better for the child's health for her to stay in Nova Scotia, and she urged him to stay there with her. There was no further argument and he said he agreed to her staying there, and gave her about \$35 or \$37 at that time, telling her that if she would stay with the little girl he would support them. There was no talk of separation. He said he would come back again, but did not say when. It appears from the evidence that he was planning to return to Nova Scotia some time in September, and that his wife had sent him a picture of the child in June, just before he was killed, because she heard that he wanted it.

She lived with her sister and took care of the little girl up to January, when she went to work at Stansfield's in Truro, where she boarded. She went every Saturday night and often during the week to see her baby, who was at her sister's. There was no communication between herself and husband, nor had there been much letter writing exchanged between them during the other times when they had been separated, although they had occasionally written. She earned money enough to support herself and her child. Although the sister fed and cared for the child, the mother bought its clothes and looked after it when she could possibly be where the child was.

There was no direct evidence to show that either party considered that the family relation had been broken; there had never been any talk of divorce or legal separation, nor was it apparently in the minds of either that this separation differed materially from previous separations; that he was in the habit of leaving his wife and going away from her to work, giving her small sums of money on his departure, and failing to send her any while he was away, although it was testified that on one occasion when she wrote for money she did receive it from him. They parted good friends, and he left her a larger sum the last time than he had ever given her before.

Therefore the committee finds, upon all the evidence in the case, that the injury which caused Nelson's death arose out of and in the course of his employment, and that his widow, Alice E. Nelson of Truro, in the county of Colchester, N. S., was wholly dependent upon his earnings at the time of the injury, being conclusively presumed to be so under clause (a) of section 7, Part II., chapter 751, Acts of 1911, as amended by chapters 571 and 172, Acts of 1912; and that there is due her from said insurance company the sum of \$7.88 per week as compensation for the period of three hundred weeks, commencing July 1, 1912, the date of the injury.

DUDLEY M. HOLMAN.

JOHN B. HOLT.

CHARLES H. BOWEN.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties in the hearing room, Pemberton Building, Boston, Mass., Tuesday, May 20, 1913, at 11 A.M., and affirms and adopts the findings of the committee of arbitration.

The Board further finds that the employee, the said Alvin R. Nelson, and the widow, Alice E. Nelson, were married on Dec. 25, 1907, living together happily during the six months immediately following their marriage, and that on or about May 24, 1908, he left Nova Scotia for Boston to find employment. He gave his wife \$20 at the time of his departure, and during the subsequent six months did not send her any money. His wife joined him in Boston in October, 1908, and remained with him until May, 1909, when he left for Chicago on a trip with a friend, against her wish. Her husband gave her \$25 just before his departure. She returned to the home of her parents on this, as well as on the occasion of his previous absence. He returned in September, meanwhile not having sent her any money, and bought a farm at Manganese Mines, N. S., about 75 miles from the home of her parents at East Mountain, N. S. The little girl was born the following August. Husband and wife had differences of opinion occasionally concerning the treatment of the stock on the farm and the work which each should do. There was a feeling on his part that she should do more work, and on her part that she was unable to perform the work expected on account of her condition after the birth of the child. Finally, when she declined to feed the calves, he told her she could take her clothes and go, and she left their home, taking her baby, going to the home of her sister at East Mountain. This was in July, 1911. He called upon her several times, asking her to return, saying that he intended to go to Boston to find employment, as he did not wish to remain in Nova Scotia on account of the scandal created by their personal troubles and his treatment of the stock. She did not wish to live in Boston, not having liked living there previously, and she told him that she thought it best for the child's health

for her to remain in Nova Scotia, and she urged him to stay with her. He finally agreed to her remaining in Nova Scotia with the child, gave her \$35 or \$37, and told her that if she would remain with the little girl he would support them. She sent him a picture of the child the following June. He had frequently spoken of returning to Nova Scotia, and his sister, Annie M. Forsell, stated that he had expressed a definite intention of returning in September. Death by personal injury arising out of and in the course of his employment intervened, however, on July 1, 1912. There had never been any talk of legal separation or divorce; there was no evidence to show that either party considered that the family relation had been severed; nor did it appear that, in the minds of either, this separation differed from previous separations. The last parting had been friendly; the husband gave the wife a larger sum of money than upon any previous occasion; he made a definite promise of support; spoke in friendly terms of wife and child to his sister, the said Annie M. Forsell, and had made definite plans to return to them in September.

The Industrial Accident Board therefore finds, upon all the evidence, that Alvin R. Nelson, the said employee, received a personal injury resulting in death, said injury arising out of and in the course of his employment, and that the widow, the said Alice E. Nelson, was wholly dependent for support upon the said employee, within the meaning of section 7 (a), Part II., of the Workmen's Compensation Act, being conclusively presumed to be wholly dependent under said section; and that there is due her from said insurance company the sum of \$7.88 per week as compensation, for a period of three hundred weeks from the date of the injury, commencing July 1, 1912, that is, a total sum due of \$2,364.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

Decree of Supreme Judicial Court on Appeal.

RUGG, C.J. This is a proceeding under the Workmen's Compensation Act, where the wife seeks to recover compensation on the ground that she is conclusively presumed to be wholly dependent upon her deceased husband because living with him at the time of his death. These are the material facts: Alice E. Nelson and her husband, Alvin R. Nelson, were married in December, 1907, in Nova Scotia, and there lived together for six months, when the husband went to Boston. He then gave his wife \$20, but during the succeeding six months sent her no money. She joined him in Boston in October, 1908, and lived with him until May, 1909, when he left for Chicago against her wish, giving her \$25. She then returned to the home of her parents in Nova Scotia. In September, 1909, not having sent her any money in the meantime, he returned to Nova Scotia and bought a farm, where they lived together until July, 1911. A child was born in August, 1910, and from then until the following July there was more or less trouble between them, and finally, because unable to do the farm work he demanded, and because he told her to take her clothes and go, she left their home with the baby and went to that of her sister, which was 75 miles distant. Thereafter he called upon her several times, asking her to return and saying that he intended to go to Boston to find employment, as he did not want to stay in Nova Scotia on account of the scandal created by their personal troubles. She did not like to live in Boston, and told him she thought it best for the child's health for her to remain in Nova Scotia, and she urged him to stay with her. He finally agreed that she remain in Nova Scotia with the child, gave her \$35, and told her that if she would remain with the child he would support them, and went to Boston. She lived with her sister with the child until the following January, when she went away to work, returning to her sister's once a week and sometimes oftener to see the baby, who continued at her sister's. "She earned money enough to support herself and her child. Although the sister fed and cared for the child, the mother bought its clothes and looked after it when she could possibly

be where the child was." She sent her husband a picture of the child the following June. He had frequently spoken of returning to Nova Scotia. Death by personal injury arising out of and in the course of his employment intervened, on July 1, 1912. There had never been any talk of legal separation or divorce, but there was no correspondence between them. There was no evidence to show that either spouse considered that the family relation had been severed, or that this departure of the husband differed from previous ones. He sent her no money during this absence, nor had he on any previous occasion, except once when she wrote him and asked him to do so. The last parting was friendly, the husband giving the wife a larger sum of money than upon any previous occasion. He promised to support them, and spoke in friendly terms of his wife and child, and made definite plans to return to them in September.

The natural description of the relation disclosed by these facts is that the husband and wife were voluntarily living apart. Each was earning a living. One wanted to live in Boston and the other wanted to live in Nova Scotia. Each had some apparent pretext for this preference, but it is not material to inquire into its substance. The fact is the essential thing. In the common speech of mankind such a relation would never be spoken of as a living together. The decisive words of the Workmen's Compensation Act, St. 1911, c. 751, Part II., § 7, are:—

The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:—

(a) A wife upon a husband with whom she lives at the time of his death.

(b) A husband upon a wife with whom he lives at the time of her death.

(c) A child or children under the age of eighteen years, . . . there being no surviving dependent parent. . . .

In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of injury.

"With whom she lives" in (a) means living together as husband and wife in the ordinary acceptation and significance of these words in common understanding. They mean main-

taining a home and living together in the same household, or actually cohabiting under conditions which would be regarded as constituting a family relation. There may be temporary absences and incidental interruptions arising out of changes in the house or town of residence, or out of travel for business or pleasure. But there must be a home and a life in it. The matrimonial abode may be a roof of their own, a hired tenement, a boarding house, a rented room, or even a room in the house of a relative or friend, however humble or temporary it may be. But it is the situation arising from the existence of a common home, a place of marital association and mutual comfort broken up or put in peril of hardship or extinction by the husband's death, which is protected by the conclusive presumption of dependency established beyond the peradventure of dispute by the statute. Under such circumstances the widow is given the benefit of an irrefutable assumption that she was supported by the husband. The correlative provision in subsection (b), giving the husband the benefit of a like presumption, confirms this view. It would seem almost absurd to hold, if conditions had been reversed and it was the husband who was seeking to recover, that he was wholly dependent upon the wife under the circumstances here disclosed. The general purpose of the act supports this conclusion. Workmen's Compensation Acts are founded upon the theory of compensation to dependents when death ensues. This rests upon the fact of dependency. The English Act makes dependency a question of fact in all cases. (*Hodgson v. West Stanley Colliery* (1910), A. C. 229; *Ratts v. Neddrie & Benhar Coal Co., Ltd.* (1913), A. C. 531.) Our act makes an exception by fixing an absolute presumption of dependency (without regard to what the fact really is) in favor of a wife and of a husband when there is an actual living together. Each is conclusively presumed to be totally dependent upon the other. It might be extremely difficult to measure the extent of dependency where the wife was earning something beside keeping the house and performing the ordinary wifely duties. Therefore our act says that where there is a real living together the fact of dependency shall not be inquired into; it shall be set at rest by a conclusive assump-

tion. It well may be that this was a legislative concession to the recognized benefit to society arising from the living together of husband and wife, and that like concession should not be made to the anomalous situation of a marital relation not accompanied by a living together, leaving the fact of dependency in such cases to be proved as it is in all other cases. There may be many instances where there is a total dependency, although there is a temporary separation of husband and wife. There may be a physical dissociation and a breaking up of the home, with a definite purpose to resume the normal conditions of married life. The act provides for these cases by requiring dependency to be determined in accordance with the truth. But the words "living together" do not aptly describe such a situation. These words are used in antithesis to living apart. They exclude a condition where there is neither a home nor an actual dwelling together, and where the suspension of this relation is something more than a mere temporary incident of a changing family habitation. It seems plain that upon the facts disclosed on this record the decedent and his wife were not living together in the sense in which these words are used in the Workmen's Compensation Act.

We are constrained not to follow *Northwestern Iron Co. v. Industrial Commission*, 154 Wis. (142 N. W. Rep. 271), so far as its reasoning is inconsistent with this conclusion.

It follows that the Industrial Accident Board should have ascertained the extent of dependency as a fact in the case at bar, and should not have applied the conclusive presumption of subsection (a). The case should be remanded to that Board for a further hearing.

Decree reversed.

CASE No. 46.

PATRICK KEANEY, *Employee.*

DANIEL L. TAPPAN *et al.*, *Employer.*

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., *Insurer.*

COMMITTEE OF ARBITRATION DECIDES HELPER ON A FARM IS ENTITLED TO COMPENSATION. FINDING REVERSED BY INDUSTRIAL ACCIDENT BOARD. DISSENTING OPINIONS FILED. SUPREME JUDICIAL COURT AFFIRMS DECISION OF BOARD.

The employee was injured while building a load of hay on a farm wagon, falling from the top of the load and receiving a broken rib and other injuries. His employers insured "drivers and helpers" under a Workmen's Compensation policy, posting a notice in the washhouse and boiler room informing their employees of this insurance. The notice referred to "drivers," while the policy covered "drivers and helpers" with an estimated pay roll of \$1,650 per annum.

Held, that the employers were "subscribers;" that the employee was a helper at the time of the injury; that a "subscriber" must accept the act in whole and not in part; that in any event "drivers and helpers" were farm laborers; that the subscribers insured their farm laborers and became subject to the act; that the employee is entitled to compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board reversed the findings of the committee of arbitration, finding that the employee was a farm laborer and not being insured, was not entitled to compensation.

Messrs. Holman and Dickinson filed dissenting opinions.

Appealed to Supreme Judicial Court.

Decision. — The Supreme Judicial Court affirms the findings of the Industrial Accident Board.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Patrick Keaney *v.* Employers' Liability Assurance Corporation, Ltd., this being case No. 46 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Dudley M. Holman, representing the Industrial Accident Board, chairman, W. Lloyd Allen, Esq., representing the insurer, and Joseph L. P. St. Cœur, representing the employee, heard the parties and their witnesses at the Hearing Room of the Industrial Accident Board, Pemberton Building, Boston, on Monday, Jan. 13, 1913, at 10 A.M., and finds as follows: —

We find that Patrick Keaney was an employee of Daniel L. Tappan *et al.*, and that on Sept. 24, 1912, while engaged in building a load of hay on a team, he fell from the top of the load of hay and received a broken rib and a bad shaking up. He was taken to the Massachusetts General Hospital for treatment.

We find that Daniel L. Tappan *et al.* insured his "drivers and helpers" under a compensation insurance policy; that he had drivers and helpers whose particular work was to drive the produce to market and deliver it, and to drive the manure wagons to and from the city stables; that he usually keeps his men all the year round; that when the teams would go to Boston these men would have to load and unload, and that they might or might not have to load up at the farm; that these men also worked at the farm, doing anything that would be connected with a farm of such description, greenhouse work, hotbed work or raising any kind of crops, and when not working on the teams they would do all kinds of farm labor; that Tappan *et al.* had many other horses and teams used in the usual farm work, and that the driving and helping on those teams was not the usual work of the men who drove the produce to market; nevertheless, these men might be used for that purpose when not engaged in going to market; that drivers and helpers on the teams at the farm might in some cases be used in loading and helping, and also driving the teams that go to market; that Mr. Keaney worked as a farm laborer for Mr. Tappan for about twenty-five years, and that he did the usual farm work, and would oftentimes be called upon to assist in driving or helping on a team, but never drove a team to market; that the hay was grown on leased land, but was loaded on land not owned by Tappan *et al.*; that Mr. Keaney was considered the most expert employee of Tappan *et al.* in building a load of hay; that Mr. Tappan *et al.* had posted a notice in the washhouse and boiler room, where all the men had to come, that he had insured. The notice itself read: —

NOTICE TO EMPLOYEES.

As required by chapter 751, Acts of 1911, Commonwealth of Massachusetts, and amendments thereto, entitled "An Act relative to payment to (here the word 'employees' was crossed out and the word 'drivers' was

substituted for it) for personal injuries received in the course of their employment, and to the prevention of such injuries."

This will give you notice that I have provided for payment to our injured employees under the above act by insuring with the Employers' Liability Assurance Corporation, Ltd., of London, 33 Broad Street, Boston.

D. L. TAPPAN,
Name of Employer.

AUG. 17, 1912.

In the policy of insurance which D. L. Tappan *et al.* took out under the name of Daniel L. Tappan and Ethel E. Tappan, which was a regular workmen's compensation policy of Massachusetts of the Employers' Liability Assurance Corporation, Ltd., of London, Eng., under the description "kind of trade, business, profession or occupation, manual classification," drivers and helpers, with an estimated pay roll of \$1,650, were insured.

We find that section 6, Part IV. of chapter 751, Acts of 1912, provides that any employer in the Commonwealth may become a subscriber. Section 20, Part IV., provides that every subscriber shall, as soon as he secures a policy, give notice in writing or print of the fact to all persons under contract of hire with him that he has provided for payment to injured employees by the association. Section 2 of Part I. provides that the provisions of section 1 shall not apply to actions to recover damages for personal injuries sustained by domestic servants and farm laborers.

We find:—

First. — That Daniel L. Tappan *et al.* were subscribers under the Workmen's Compensation Act (see section 6, Part IV.), and that Patrick Keaney was an employee of Tappan *et al.*, and was injured in the course of his employment.

Second. — That Daniel L. Tappan *et al.* by the terms of the policy insured drivers and helpers, and that, as a matter of fact, Patrick Keaney was a helper at the time of the injury.

Third. — In any event, we hold that a subscriber must accept the act in whole and not in part. That Daniel L. Tappan *et al.*, having voluntarily become subscribers, were obliged by section 20, Part IV., to notify all persons under contract of hire, and therefore automatically placed themselves in the position of employers under the act.

Fourth. — In any event the drivers and helpers of the subscribers, as a matter of fact, were farm laborers.

Fifth. — That the subscribers in fact insured their farm laborers, and thereby waived the exemption and became subject to the act.

Sixth. — That Patrick Keaney is entitled to recover under the Workmen's Compensation Act.

DUDLEY M. HOLMAN.
JOSEPH L. P. ST. CŒUR.

Dissenting Opinion.

The general policy of the act is one of benefit to the farmer, and all provisions in the act should be construed in a light most favorable to the farmer. The farmer need take out no insurance and yet have all his common-law defenses open to him. He should be allowed to take insurance on his extra hazardous risks, and if he does so he should be allowed to have his common-law defenses open to him against that class of risk which he did not insure. To rule that the farmer cannot divide his pay roll or liability, and that if he insures one class of risk he is obliged to insure all his farm hands, is to repudiate the policy of the act, which is one of benefit to the farmer.

I submit, therefore, that Mr. Tappan was well within the rights under the act in splitting his pay roll or liability, and therefore Mr. Keaney cannot recover.

Further Opinion.

As a question of fact I find:—

(a) That it was the intention of the insurance and the insured to cover only "drivers and helpers" by the policy of insurance in this case.

(b) That "drivers and helpers" is used in a technical or peculiar sense, as applied to this farm.

(c) That "drivers and helpers," as explained by Mr. Tappan and Mr. Keaney, means a certain class of drivers and helpers who drove the wagons loaded with produce to the market in Boston and return.

(d) That Mr. Keaney was not a driver or helper within the explanation above set forth.

Wherefore I rule he is not entitled to compensation.

W. LLOYD ALLEN.

Report of Joseph L. P. St. Cœur, Arbitrator.

I hold:—

First.— That Patrick Keaney was insured by Daniel L. Tappan *et al.* under the Workmen's Compensation Act, and is entitled to the full benefit of said act.

Second.— That Daniel L. Tappan *et al.*, by the terms of the policy, insured drivers and helpers, and that as a matter of fact Patrick Keaney was a helper at the time of the injury within the terms of this policy.

Third.— That parol evidence cannot be introduced to vary the terms of a written instrument, and the subscriber, therefore, cannot show by parol evidence or otherwise that certain class or classes of drivers and helpers were intended.

Fourth.— In any event Tappan *et al.*, having become subscribers under the act and required to give notice to all employees, could not insure part and not all.

Fifth.— In any event, drivers and helpers of the subscriber were, as a matter of fact, farmers, and therefore the subscriber in fact insured his farm laborers, and thereby waived the exemption and became subject to the act.

JOSEPH L. P. ST. CŒUR.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, Pemberton Building, Boston, Mass., Wednesday, May 21, 1913, at 3 P.M., and, revising the decision of the committee of arbitration, finds as follows:—

The employer, Daniel L. Tappan, carried on a market garden in Arlington, Mass. At the time of the injury to Patrick Keaney, the employee, Mr. Tappan had in his employ four

drivers and four helpers, who were engaged in the work of driving the produce of the farm to market and delivering it in the city of Boston. All of the driving and delivering was done by these four drivers and helpers. These men were employed the year round. When they were not engaged in the work of delivering the produce of the farm, they worked upon the farm doing all kinds of farm work. In addition to these so-called drivers and helpers, Mr. Tappan employed upon his farm certain men who were engaged exclusively in the work of farm labor, and who did nothing in the way of driving or helping on the teams engaged in delivering. Mr. Keaney, the injured man, was such a laborer; that is, he was engaged exclusively in farm labor, and had not been engaged at any time in the work of driving and helping to distribute the produce of the farm. At the time of the injury he was on the top of a load of hay, and hay was being gathered on Mr. Tappan's land for his own use and not for sale.

Mr. Tappan procured a policy of insurance in the Employers' Liability Assurance Corporation, Ltd., insuring his "drivers and helpers" on an estimated pay roll of \$1,650 a year. As a matter of fact, the pay roll of his "drivers and helpers" was more than \$1,650 a year. The policy was issued on the thirty-first day of July, 1912. Shortly before this time the employer had been informed that he would be liable in case the "drivers and helpers" were injured while engaged in the work for which they were hired.

The employer did not intend to have the Workmen's Compensation Act cover all of his farm laborers. What he desired to do was to protect himself from loss in case any of the men engaged in the work of distributing his farm produce were injured, and this was his sole purpose in procuring this policy of insurance.

If these so-called "drivers and helpers" were not farm laborers within the meaning of the act, then Tappan had the right to give them the benefit of the Workmen's Compensation Act, without thereby making himself liable under the act to all of the employees upon his farm; that is to say, by insuring the "drivers and helpers" he did not thereby make himself liable to his employees who were strictly farm laborers within the

meaning of the act, and thereby excluded. It is to be noted that farm laborers are expressly excluded from the act (see Part I., section 2). The Legislature clearly intended to leave the farmer exactly where he was before the Workmen's Compensation Act was passed. It intended to exclude his farm laborers from any rights or benefits under the act, and to exempt the farmer from all liability under the act, and so, if these "drivers and helpers" whom Tappan intended to insure were not farm laborers while engaged in the work of driving, loading and unloading the teams, he had the right to insure them without subjecting himself to any additional liability to his farm laborers. If this is not so, then it follows that an employer who is engaged in farming as a trade or business, and also in the trade or business of manufacturing cigars from the tobacco raised on his farm, cannot protect his cigar makers under the Workmen's Compensation Act without also doing the same thing for his farm laborers. He cannot, in other words, divide his insurance so as to protect himself where he is liable under the act, without also subjecting himself to liability to respond in damages to those employees of his who are not within the purpose and meaning of the act.

If it is true that the "drivers and helpers" in this case, while engaged in distributing farm products, are engaged in farm labor, there is nothing in the statute which prevents the employer from insuring a part of his farm employees without insuring all of them. While it is true that the language of the act, fairly construed, makes the employer liable for all of his employees if he becomes a subscriber by insuring any of them, so that in ordinary cases if an employer becomes a subscriber as to a part he becomes a subscriber as to all of his men, it is to be noted that this language of the act applies only to the ordinary employer, the employer who is engaged in some business other than farming or the running of a household. It is to be remembered that throughout the whole act the Legislature was dealing with the employer, desiring, by taking away the ordinary defenses, to make it advantageous to insure his employees under the statute. The fair construction of the statute does not prevent the farmer from insuring a part of his employees without thereby being forced to insure all of them.

The farmer is in a class by himself. He may give the benefit of the act to his employees or not, as he decides. He may think that one man upon his farm, while driving a vicious bull or operating a mowing machine or engaged in some other hazardous undertaking, is in a peculiar place of danger and should be protected, and he has the right to so protect him, and save himself from possible bankruptcy, without protecting other of his employees who are not so exposed to any special hazard. The same thing is true of a householder. He may have one or more employees about his house who are engaged in what might be called dangerous employment. He may have a chauffeur, or a gardener, or a man caring for his horses. He may think it wise to save himself and protect these employees by taking out a policy under the Workmen's Compensation Act, or by taking out, for such employee or employees, a straight accident policy. Why should he not be permitted to do this without being compelled to insure all who are engaged in domestic service in his employ? If it were the intention of the Legislature to exclude a householder and a farmer from the Workmen's Compensation Act, and yet give them the right voluntarily to take advantage of it if they wished, there is nothing in the act which compels them thereby to protect everybody in their employ. They can come in under the act or stay out, and if such employers come in, they are not obliged, by any language of the act, to protect all of their employees. They have their right of election as to whether they will insure any of their employees, and how many.

The employee asked for the following rulings:—

1. That Daniel L. Tappan *et al.* were subscribers under the Workmen's Compensation Act, and that Patrick Keaney was an employee of Tappan *et al.*, and was injured in the course of his employment.

2. That Tappan *et al.*, by the terms of the policy, insured drivers and helpers, and that as Patrick Keaney was a helper, as a matter of fact he is entitled to recover.

3. That parol evidence cannot be introduced to vary the terms of the written instrument, namely, the policy, and it cannot be shown by parol evidence, or otherwise, that certain class or classes of drivers and helpers were intended.

4. That the drivers and helpers of the subscribers were farm laborers.

5. The subscribers, having insured the farm laborers, thereby waived the exemption and became subject to the act.

6. That Tappan *et al.*, having become subscribers under the act, could not insure part and not all of their employees.

7. That Patrick Keaney is entitled to recover under the Workmen's Compensation Act.

As to the first request, the Industrial Accident Board rules that Keaney was an employee of Tappan, was injured in the course of his employment, and that, while Tappan was a subscriber under the Workmen's Compensation Act, Keaney was not one of the employees whom he insured.

The second request is refused.

The fourth request is refused.

The fifth request is refused.

The sixth request is refused.

The seventh request is refused.

As to the third request, no evidence was introduced before the Industrial Accident Board. Our findings are made upon the evidence introduced before the committee of arbitration, and there was no evidence violating the parol evidence rule introduced at that hearing that has influenced our decision.

We therefore find that Patrick Keaney, being a farm laborer and not being insured by his employer, Daniel L. Tappan, is not entitled to compensation under the Workmen's Compensation Act.

JAMES B. CARROLL.

EDW. F. MCSWEENEY.

JOSEPH A. PARKS.

Dissenting Opinion.

The undersigned member of the Board is unable to agree with the conclusions arrived at by the majority of the Industrial Accident Board in the case of Patrick Keaney, employee, the Employers' Liability Assurance Corporation, Ltd., insurer, and Daniel L. Tappan *et al.*, employer.

It was plainly the intention of the Legislature, in enacting the Workmen's Compensation Act, so called, chapter 751, Acts

of 1911, as amended by chapters 172 and 571 of the Acts of 1912, to exempt two classes of employers from the inducement or coercive provisions of section 2 of Part I. of this act. The Workmen's Compensation Act is an elective act and not a compulsory act, but in order to compel employers of labor, other than in these two classes, namely, domestic servants and farm laborers, to insure under the act, Part I. provides that the three main defenses hitherto relied upon by employers of labor for their protection against suits to recover damages for personal injuries should be removed from employers who do not insure: first, that the employee was negligent; second, that the injury was caused by the negligence of a fellow employee; and third, that the employee had assumed the risk of the injury. These defenses are removed in the case of employers who do not come in under the act.

It was the evident intention of the Legislature not to apply these inducements or coercive provisions to employers of domestic servants and farm laborers. There is nothing in the act, however, that bars an employer of farm laborers from becoming a subscriber and coming in under the act, and thus receiving the benefits of the act; and these benefits are substantial for the employer.

The status of the employees of a farmer, as to the right to recover damages for personal injuries, is unchanged by this act, provided the employer does not insure, and the farmer is liable for damages to an indefinite amount for injuries received by a farm laborer in the course of his employment if that injury is due to the negligence of the farmer, his superintendent or agent, or to defect in the ways and machinery employed, provided there was no assumption of risk, contributory negligence or negligence of a fellow workman.

When an employer of labor insures under the act, his liability, so far as being responsible for damages for personal injuries received by employees in the course of their employment, is at an end, and is fixed by the amount of annual premium which he pays to the insurer. Hence, an employer under the act exchanges a possible indefinite amount of damages for a certain fixed payment of money, and his liability is limited thereto. In order that farmers might take advantage of this

provision, and thus limit their liability, section 6 of Part IV. gives them that opportunity. It provides that "any employer in the Commonwealth may become a subscriber."

In order, therefore, that any employer may come in under the act whose employees at least were such according to the definition of employee in Part V., it is provided in section 6 of Part IV. that any employer in the Commonwealth may become a subscriber. The definition of "subscriber" in section 2, Part V. of the Workmen's Compensation Act says, "'Subscriber' shall mean an employer who has become a member of the association by paying a year's premium in advance and receiving the receipt of the association therefor, provided that the association holds a license issued by the insurance commissioner as provided in Part IV., section twelve."

In this particular case the employer insured with a liability insurance company, and the provisions of section 3, Part V., are the provisions under which he takes out his policy. Section 3 of Part V., as amended by section 17, chapter 571, Acts of 1912, provides "any liability insurance company authorized to do business within this commonwealth shall have the same right as the association to insure the liability to pay the compensation provided for by Part II. of this act, and when such liability company issues a policy conditioned to pay such compensation the holder of such policy shall be regarded as a subscriber so far as applicable within the meaning of this act, and when any such company insures such payment of compensation, it shall be subject to the provisions of Parts I., II., III. and V. and of section twenty-two of Part IV. of this act, and shall file with the insurance department its classifications of risks and premiums relating thereto, and any subsequent proposed classifications or premiums, none of which shall take effect until the insurance commissioner has approved the same as adequate for the risks to which they respectively apply."

When an employer has become a subscriber under section 6, Part IV., the provisions of section 20, Part IV., provide that "every subscriber shall, as soon as he secures a policy, give notice, in writing or print, to all persons under contract of hire with him that he has provided for payment to injured employees

by the association." Section 21, as amended by section 16 of chapter 571, Acts of 1912, provides that "every subscriber shall give notice in writing or print to every person with whom he is about to enter into a contract of hire that he has provided for payment to injured employees by the association. If an employer ceases to be a subscriber he shall, on or before the day on which his policy expires, give notice thereof in writing or print to all persons under contract with him. In case of the renewal of the policy no notice shall be required, under the provisions of this act. He shall file a copy of said notice with the industrial accident board. The notices required by this and the preceding section may be given in the manner therein provided or in such other manner as may be approved by the industrial accident board." Section 3 of Part III., as amended by section 8 of chapter 571, Acts of 1912, provides that "the board may make rules not inconsistent with this act for carrying out the provisions of the act."

It was the evident intention of the Legislature to exempt from the inducement or coercive features of section 2, Part I. of the Workmen's Compensation Act, the employers of farm laborers. Farm laborers are specifically mentioned in Part I. of the act, the Legislature evidently feeling that employers of this class of employees should not be coerced into assuming the added burden of insurance, and hence the provisions that are practically used as a club to drive other employers in under the act, namely, the removal of the three defenses above named, was not made applicable to them. In fixing the status of these particular men whom Tappan wished to insure, the ruling of the Industrial Accident Board of Sept. 12, 1912, which may be considered a fair interpretation of the meaning of the act as it appeared to the members of the Industrial Accident Board, may be cited. The Board, through its secretary, advised Messrs. John C. Paige & Co., of 65 Kilby Street, Boston, Mass., as follows: "We have yours of the 16th inst., and without prejudice to any matter that may be presented to the Industrial Accident Board for formal action, I desire to advise you that 'market gardeners' employees operating teams which bring the produce to Boston' are probably farm laborers within the meaning of the words as used in section 2, Part I. of the

Workmen's Compensation Act, and, therefore, not covered by the law." Again, on Jan. 9, 1913, in a letter addressed to Messrs. Perry, Jenney & Potter, 57 William Street, New Bedford, Mass., the Industrial Accident Board ruled: "It is the opinion of the Industrial Accident Board that the words 'farm laborers' are to be given a liberal construction; in other words, it was the intention of the act to exclude from its meaning men who were engaged in farm labor; and we therefore think that the employee in the case you put — of the farm laborer cutting wood or logs for use on the farm, or wood and logs to be sold — would not be included within the meaning of the Workmen's Compensation Act. It seems to us that cutting wood and logs is just as much a part of farm labor, within the fair intent of the law, as the planting and harvesting of crops; and it makes no difference if this wood is to be sold on the market. Neither do we think that a farm laborer ceases to be such because he is incidentally engaged in peddling milk or cutting ice for the purpose of keeping his milk."

While these rulings were dicta, not having the effect of decisions, nevertheless I believe that they are correct in principle and applicable to this case, and that the refusal of the majority so to rule in accordance with the fourth request is an error.

These interpretations of the meaning of the law were meant to advise insurance companies and attorneys as to the opinion of the Industrial Accident Board as to what was a fair construction of the term "farm laborer."

It appears in the evidence that Tappan *et al.* insured so-called "drivers and helpers." It also appears that these so-called "drivers and helpers" were farm laborers; and in no way distinguishable from the other farm laborers, save that it was a part of their duty to haul the produce to market and market it, as it was also a part of the duty of others on the farm to milk the cows and care for the milk, both being parts of farm labor under a fair construction of the term as ruled by the Industrial Accident Board in the two cases cited above. If the Legislature intended to create a special class of farm laborers whom the employer should be induced to insure, some provision would have been made in the act for that class of employees.

The Legislature clearly intended to leave the farmer exactly where he was before the Workmen's Compensation Act became a law if he did not insure. The majority opinion of the Board states: "It intended to exclude his farm laborers from any rights or benefits under the act, and to exempt the farmer from all liability under the act; and so, if the 'drivers and helpers' whom Tappan intended to insure were not farm laborers while engaged in the work of driving, loading and unloading the teams, he had the right to insure them, without subjecting himself to any additional liability to his farm laborers." It would, therefore, appear, if this statement is correct, that if they were not farm laborers because engaged in carrying produce to the market, then all employees of farmers who carry products of the farm to market are not farm laborers, and the burden is upon their employers to insure them, or be called upon to respond in damages, with their defenses removed, if they are injured in the course of their employment.

The Industrial Accident Board has never questioned the right of employers, either of domestic servants or of farm laborers, to insure under the act if they so elected, but there is nothing in the act, either in express terms, or by a fair construction of the meaning of the act, which forbids the employer of farm labor to become a subscriber under the act, provided he accepts the act as the Legislature intended every employer to accept it, subject to all of its requirements if he is to receive all of its benefits.

I cannot agree with the opinion of the majority that "the very plain language of the act fairly construed, which makes the employer liable for all of his employees if he becomes a subscriber by insuring any of them, so that in ordinary cases, if an employer becomes a subscriber as to a part he becomes a subscriber as to all of his men, applies only to the ordinary employer, the employer who is engaged in some business other than farming or the running of a household." The farmer is in a class by himself so long as he does not choose to avail himself of the provisions of the Workmen's Compensation Act. If he does so elect, he must accept the Workmen's Compensation Act as the Legislature intended that every employer should accept it, to insure under the act and become subject to its

provisions and its benefits. I think that the principle which is enunciated in the majority report, if carried out to its logical conclusion, namely, that "the farmer who may think that one man upon his farm, while driving a vicious bull or operating a mowing machine, or engaged in some other undertaking, is in a peculiar place of danger and should be protected, and that he has the right to so protect him and save himself from possible bankruptcy without protecting others of his employees who are not so exposed to any special hazard," would apply with equal force to any employer, whether a farmer or in an industrial pursuit, and that this would open the door for a practical wiping out of the benefits of the Workmen's Compensation Act for hundreds and thousands of employees whose employers might so elect to extend the benefits of this act only to those engaged in specially hazardous employments, and leave unprotected the thousands of other employees not in a particularly hazardous employment. The law was not enacted to protect only those exposed to any special hazard; it is broader than that, and must be construed in as broad a way as its provisions seem to require. The Workmen's Compensation Act makes no distinction of hazards, neither was it designed solely for the protection of an employer against a possible bankruptcy, nor to limit the field of its operations only to those subject to special hazard in their employment.

It is true that farmers are not induced by section 2 of Part I. to come in under the act, yet they are given the right voluntarily to take advantage of it if they wish. They can come in under the act or stay out, but if they come in they must be bound by the language of the act, and must afford protection to all of their employees, and not to those who possibly may be exposed to a particular hazard.

What was the intention of the Legislature in exempting from the inducement or coercive features of section 2 of Part I. of this act employers of domestic servants and farm laborers? It was evidently their intent to make it possible for them not to incur the extra expense of insurance, which might be a burden, particularly upon the smaller employers, but it provided a way whereby if they saw fit, after carefully weighing the advantages to be derived by accepting the provisions of the

act, they might, if they chose, avail themselves of this permission and become subscribers, thereby limiting their liability to the amount of premiums paid.

The employee in this case comes fully under the definition of "employee," as stated in section 2, Part IV. of the Workmen's Compensation Act, working as he was "in the usual course of the trade, business and occupation of his employer."

It might be held that a domestic servant was entirely outside of the operation of all parts of this act by reason of the definition in said section 2, Part IV., which provides that "employee" shall include every person in the service of another except one whose employment is not in the usual course of the occupation of his employer.

Moreover, it is possible that a domestic servant of a householder was meant to be treated as an "employee" under this act if the householder chose to become a subscriber, as section 6, Part IV., authorizes, which provides that "any employer in the commonwealth may become a subscriber."

But however this might be in the case of a domestic servant, there is not a doubt but that the employee in this case comes fully within the definition as stated by section 2, Part IV. of the act, and in this particular differs from a domestic servant.

As it was the evident intent of the Legislature to exempt from the inducement or coercive features of section 2 of Part I. of the Workmen's Compensation Act the employers of farm labor, this decision of the Industrial Accident Board, if it be affirmed by the Supreme Court, practically serves notice on the agricultural employers of this Commonwealth that they must or should insure all those farm laborers who are engaged in carrying the produce of the farm to market, whether that means the milk which is produced and sold by the farmer in the village or town where his farm is located, whether it be the wood which he cuts from his wood lot and sells to a dealer in wood, or whether it be the crops which he raised and which he delivers either to market or to the railroad station, or to some purchaser in his immediate vicinity. In other words, this decision of the Industrial Accident Board creates a new class, which was not contemplated by the Legislature, of farm laborers who are not farm laborers when engaged in carrying the produce

of the farm to market or to possible customers, and a burden from which the Legislature evidently intended to relieve the farmer will be imposed upon the agriculturists of this Commonwealth by this decision. The Legislature well knew, when it exempted the farmer or the employer of farm labor from the provisions of the Workmen's Compensation Act, that he was exposed, as he always had been exposed, to possible bankruptcy by reason of damages secured by an employee for injuries received arising out of and in the course of his employment; and it left for his protection against this possible bankruptcy the three main defenses on which employers relied to protect themselves against recovery of damages through suits brought by injured employees which are removed from other employers who do not insure under the act.

I find, therefore, that Patrick Keaney, being a farm laborer whose employer had taken out a policy of insurance and become a subscriber under the provisions of the Workmen's Compensation Act, was injured by an accident which arose out of and in the course of his employment, and that he is entitled to recover the compensation fixed by the provisions of the act, of one-half his average weekly wages during the time of his entire incapacity, beginning with the fifteenth day after the accident, and to medical and hospital treatment during the first fourteen days after the accident.

DUDLEY M. HOLMAN.

Dissenting Opinion.

The undersigned is unable to agree with the majority of the Board. If the employer of the injured employee was a subscriber at the time the injury was received, it is my opinion that the insurance company is bound to pay compensation for the injury in accordance with section 1, Part II. of the compensation act. It would seem that the employer in this case must be regarded as a subscriber, and that he was so regarded both by himself and the insurance company, even though he had intended to become such to a limited extent. If the employer had thus become a subscriber in the Massachusetts Employees Insurance Association, incorporated under the Workmen's Compensation Act, so called, there seems no doubt that

he would thereby have become subject to the obligation to meet any assessments made by the association if the need required, in the same manner as any other subscriber, and that this would be true notwithstanding the fact that he had taken out a policy from the association intended only to apply to part of his employees. This would show that he had the status of a subscriber.

The word "subscriber" is defined and particularly referred to in the act. Section 2 of Part V. says that "subscriber" shall mean an employer who has become a member of the association by paying a year's premium in advance and receiving the receipt of the association therefor, provided that the association holds a license issued by the Insurance Commissioner as provided in section 12, Part IV. Section 3 of Part V. provides that "Any liability insurance company authorized to do business within this commonwealth shall have the same right as the association to insure the liability to pay the compensation provided for" by Part II. of this act, and when such liability company issues a policy conditioned to pay such compensation, the holder of such policy shall be regarded as a subscriber so far as applicable within the meaning of this act; and when any such company insures such payment of compensation it shall be subject to the provisions of Parts I., II., III. and V. and of section 22 of Part IV. of this act. If an employer who had insured only part of his employees were held not to be a subscriber under the act, it would seem that the whole system of workmen's insurance and rights to compensation under the act, both as regards employees and employers in this State, would be left in uncertainty at all times. If an employer of large numbers of persons insured all his employees, with the exception of a few whom he left out, such as office clerks, such employer would have to be held not to be a subscriber, with the consequence that neither the employer nor the great mass of his employees would be protected by the provisions of the act. The employer under such a construction of the law, under such circumstances, would therefore still be liable to suits at common law by any and all of his employees who are injured in their employment, although he had paid an insurance premium for most of them under the act; and all the employees, on their

side, would have no right to compensation under the act. It would therefore seem that an employer who becomes a subscriber for any part of his help must have been contemplated, as a practical matter, to have become thereby a subscriber for *all* his help. This construction of the law seems to be the only one that is in harmony with its general purpose and policy. This construction also seems required by the express provisions of the act, and the relation of its different parts to the scheme as a whole. Section 5 of Part I. states that "an employee of a subscriber" shall be held to have waived his right of action at common law if he has not given his employer a written notice claiming such right. If the employees of a subscriber are held by the operation of this act to have waived their rights of action at common law, they certainly, on the other hand, must be held to have been given by the law their right to compensation as an equivalent. Section 1, Part II., states explicitly that "If an employee . . . receives a personal injury arising out of and in the course of his employment, he shall be paid compensation by the association, as hereinafter provided, if his employer is a subscriber at the time of his injury." It also appears from section 17, Part III., that "If a subscriber enters into a contract with an *independent contractor* to do such subscriber's work, . . . the association shall pay to the employees of such independent contractor, or the employees of a sub-contractor, any compensation which would be payable to them under this act if the independent or sub-contractors were subscribers." It would seem from this section that all of the employees of an independent contractor, or of a sub-contractor, who were doing the work of a subscriber, were contemplated by the act *en masse* to be entitled to compensation from the insurer of the subscriber. If all such employees as these, who are *indirectly* doing work of the subscriber, are entitled to compensation, it would certainly seem that all those who are *directly* employed by the subscriber are equally intended to be entitled to compensation in case of injuries. Furthermore, section 20, Part IV., requires that "every subscriber shall as soon as he secures a policy give notice to *all* persons under contract of hire with him that he has provided for payment to *injured employees* by the association;" section 21, Part IV., that "he shall give notice to all persons about to enter into any

contract of hire with him that he has provided for payment to injured employees by the association."

I am therefore of the opinion that for the above reasons the injured employee in this case is entitled to compensation, as he received a personal injury arising out of and in the course of his employment, and his employer was a subscriber at the time of the injury.

The contention that section 2 of Part I. deprives the employee of compensation does not seem to be valid, as this section simply provides that certain defenses shall not apply in *actions at law* brought by domestic servants or farm laborers against their employers. If this employer, who was a farmer, had not accepted the act by insuring thereunder, this section would have left his employees exposed to the old defenses in their actions at law against him for personal injuries; but inasmuch as this employer has elected to become a subscriber, there is nothing in the act which provides that the consequences of such election by him are different from those which follow the election of any other subscriber. Employees of a farmer came within the definition of an employee, as stated in section 2 of Part V., as fully as those of any other employer; and section 6 of Part IV. provides that "any employer in the commonwealth may become a subscriber."

It would also appear, from the history of workmen's compensation acts in the United States since that of New York was declared unconstitutional in *Ives v. South Buffalo Ry.*, 201 N. Y. 271, Bradbury's *Workmen's Compensation*, Introduction, XXXI, that these acts were made elective in form to avoid constitutional objections, but that their general intent remained the same, — to make their application as nearly universal and compulsory as was permissible, — such a general scheme of compensation law being regarded as in accordance with sound public policy and the general welfare.

DAVID T. DICKINSON.

Decree of Supreme Judicial Court on Appeal.

RUGG, C.J. This is a proceeding under the Workmen's Compensation Act. The material facts as found by the Industrial Accident Board are these: —

The employer, Daniel L. Tappan, carried on a market garden in Arlington, Mass. At the time of the injury to Patrick Keaney, the employee, Mr. Tappan had in his employ four drivers and four helpers, who were engaged in the work of driving the produce of the farm to market and delivering it in the city of Boston. All of the driving and delivering was done by these four drivers and helpers. These men were employed the year round. When they were not engaged in the work of delivering the produce of the farm they worked upon the farm, doing all kinds of farm work. In addition to these so-called drivers and helpers, Mr. Tappan employed upon his farm certain men who were engaged exclusively in the work of farm labor, and who did nothing in the way of driving or helping on the teams engaged in delivering. Mr. Keaney, the injured man, was such a laborer; that is, he was engaged exclusively in farm labor and had not been engaged at any time in the work of driving and helping to distribute the produce of the farm. At the time of the injury he was on the top of a load of hay, and hay was being gathered on Mr. Tappan's land for his own use and not for sale.

Mr. Tappan procured a policy of insurance in the Employers' Liability Assurance Corporation, Ltd., insuring his "drivers and helpers" on an estimated pay roll of \$1,650 a year. As a matter of fact, the pay roll of his "drivers and helpers" was more than \$1,650 a year. The policy was issued on the thirty-first day of July, 1912. Shortly before this time the employer had been informed that he would be liable in case the "drivers and helpers" were injured while engaged in the work for which they were hired.

The employer did not intend to have the Workmen's Compensation Act cover all of his farm laborers. What he desired to do was to protect himself from loss in case any of the men engaged in the work of distributing his farm produce were injured, and this was his sole purpose in procuring this policy of insurance.

It is manifest from this statement of the facts that Patrick Keaney was a farm laborer. He performed the ordinary work which is done by one hired by a farmer to aid in the common incidents of agricultural employment. (*Rowley v. Ellis*, 197 Mass. 391.) He was neither a driver nor helper in any proper meaning of those words, although occasionally he may have driven a team as a part of his farm work, and although in a most general sense he helped about the farm. His employer was a farmer.

The Workmen's Compensation Act was not intended to confer its advantages upon farm laborers, or to impose its burdens upon farmers. (St. 1911, c. 751, Part I., § 2.) The legislative policy of exempting them from statutory benefits and

liabilities established in addition to those of the common law disclosed in the Employers' Liability Act, St. 1909, chapter 514, section 142, has been continued in the Workmen's Compensation Act. A farmer employing laborers in agriculture suffers no harm in not undertaking to become a subscriber under the Workmen's Compensation Act. Hence, it is apparent that a farmer who chooses to avail himself of its terms and thereby to confer the boon of its protection upon his employees, does so on other grounds than those which might actuate the manufacturer or other employer of labor. There is much strength in the arguments drawn from the definition of "subscriber" in Part V., section 1, and of the requirements imposed upon subscribers by Part IV., sections 20 and 21, that if one becomes a subscriber at all or in any respect he must be subject fully and without reservation or exception to all the provisions of the act. These arguments possibly might be decisive as to all employers save those excepted from the act. But as applied to employers of the excepted classes they are not of countervailing force.

The act is a practical measure designed for use among a practical people. There appears to be no reason for saying that a farmer may not adopt it if he desires. Any contract of insurance made by him under its terms is valid and enforceable. On the other hand, if he does not desire to make it available for all of his employees, there is no insuperable objection to his undertaking an insurance for a limited portion of them. If there are those, separable from others by classification and definition, whose labor is more exposed or dangerous, or whom he may desire to protect for any other reason, there is nothing in the act reasonably interpreted to show why he may not do so. The purposes of the act, which have been discussed at length in *Gould's Case*, 215 Mass. 480, are such that, if feasible, it ought to be extended to include cases within its scope, interpreted in the light of its purpose and to encourage its adoption by those who for reasons of legislative policy were excepted from its express operation. If construed to compel farmers to insure for all their laborers if they undertake to insure any of them, the inevitable tendency would be to discourage resort to the act in any respect.

It is not necessary to decide whether those described in the policy as "drivers and helpers" were farm laborers or not. If they were, the grounds which have been stated are decisive against the employee. If they were not, but belong to a different class of employees not within the exception created by section 2 of Part I. of the act, then the farmer would be deprived of that exemption, provided he was also engaged in some other line of business as to which he desired to come under the act. Such an interpretation of the act would be contrary to its declared purpose. The exemption applies to all farmers so far as concerns farming operations, whether carrying on other business or not.

Decree affirmed.

CASE No. 61.

JOHN IRA BENTLEY, *Employee.*

BURNHAM BROTHERS, *Employer.*

MASSACHUSETTS EMPLOYEES INSURANCE ASSOCIATION, *Insurer.*

SUPREME JUDICIAL COURT DECIDES THAT WIDOW SEPARATED
FROM HER HUSBAND IS NOT A DEPENDENT. MINOR CHILD
A PARTIAL DEPENDENT.

The evidence disclosed the fact that the widow, with her child, left the home of the employee in June, 1908, for justifiable cause, and since that time they never lived together. The employee contributed \$2 weekly to the minor child.

Held, that the widow was not a dependent and that the child was a partial dependent.

Review before the Industrial Accident Board.

Decision.— The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to Supreme Judicial Court.

Decision.— The Supreme Judicial Court affirms the findings of the Industrial Accident Board.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of John Ira Bentley v. Massachusetts Employees Insurance Association, this being case No. 61 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of Edward F. McSweeney, chairman, representing the Industrial Accident

Board, James W. Rollins of Boston, representing the insurer, and Daniel J. Gallagher of Boston, representing the employee, heard the parties and their witnesses in the Hearing Room of the Industrial Accident Board, Room 201, Pemberton Building, on Thursday, Jan. 9, 1913, at 9.30 A.M.

John Ira Bentley, carpenter by occupation, wages \$20 a week, employed by Burnham Brothers, Newton, Mass., was injured while in the course of his employment by coming into contact with a splitting-saw, which cut off his thumb and cut four fingers. As a result of the operation which followed he got "post operative" or ether pneumonia, and on Aug. 18, 1913, died as a result of this injury, which arose out of his employment.

The agreed statement of facts is as follows:—

John Ira Bentley married Julia Bentley in the year 1894.

He lived with her and supported her until June, 1908.

A child, Almira Susan Bentley, was born in 1899.

Julia Bentley and the child, Almira Susan Bentley, are now living in the town of Weston, where Julia Bentley is employed as housekeeper.

In June, 1908, Julia Bentley and the child left the house of John Ira Bentley for justifiable cause, and since that time wife and husband have never lived together, and neither the wife nor the child has since received any support from Bentley. After the separation, Julia Bentley, having no resources for her support, went to live with a sister who gave her a home for a few months. She then obtained employment, and has since been engaged in general housework and housekeeping, and in this manner has supported herself and her child, Almira Susan Bentley.

Mr. Bentley was fifty-five years old at the time of his death. His average weekly wages were \$20.

Either side may introduce additional evidence.

At the arbitration meeting and hearing held in this case on Jan. 9, 1913, Ina M. Bentley, a daughter of the deceased Bentley and his first wife, testified as to the facts of the separation. That her father was a drinking man; that his conduct was such that her stepmother, Mrs. Julia Bentley, and herself, agreed that it was impossible to continue family life, because of the father's actions, and that separation resulted, the mother going to live for a while with a relative and subsequently going to Weston, where she has been a housekeeper, and supported the minor daughter, Almira Susan Bentley, and herself. The

daughter by the first wife, Ina Bentley, who is of age, is a dentist's assistant, and has been able to support herself at that profession. She testified that her stepmother was unable to be present at this hearing; that they were good friends, and that she had affection for her stepsister Almira. She further testified that there had been meetings between her father and his wife, the conversation at these meetings taking the form of the prospects of the father being able to reform and providing a home again for his family. At one time he promised to give his wife money whenever he could. The mother supported Almira, and on one occasion when the father was ill the wife had given him a pair of shoes and about \$2 in money. During the five months of the two years just previous to the death of John Ira Bentley, he was sick on various occasions, and the daughter, Ina Bentley, had during these periods given him money to help him along.

On January 19 the mother, Julia Bentley, with the minor daughter, Almira Susan, and her stepdaughter, Ina Bentley, presented themselves at the offices of the Industrial Accident Board and said that on account of Mrs. Bentley's occupation it was impossible to get away more than once a month. Mr. Pillsbury, attorney for the Massachusetts Employees Insurance Association, participated in the examination of Mrs. Bentley and Ina Bentley.

Mrs. Bentley stated that she was a housekeeper in Weston, receiving \$3.50 a week, and in addition was given board and lodging for herself and her minor daughter, who attended school. The only contribution she ever remembered having received personally from her deceased husband was \$2, which he gave her one Sunday when she was visiting him on Springfield Street. He also gave the little girl 50 cents at that time, and promised to give her (Mrs. Bentley) \$5 if she would call the following Sunday, but she could not get away from work and never received the money. Mrs. Bentley stated that he never bought the little girl anything, but that she had received help from her stepdaughter.

Ina Bentley stated she had never helped her stepmother with money that she personally earned, because she only earned enough to support herself. During the first two or three years after the separation she received amounts of money from her

father when he was working, which she in turn would give to her stepmother when she saw her. She would also pay little bills for her. During the last year her father's health had not been good and she had loaned him money when he had been sick, but this money he and she considered as a loan, which he generally paid back. He was able to maintain himself except for five months (January, February and March, 1911, and May and June, 1912). During the year before the death of her father she had visited him Saturday nights. When he had money he generally gave her \$2 every visit. Perhaps out of every eight weeks there would be two weeks when she would not receive any money from him; these would be times when he would get drunk on a Sunday and stay so until Tuesday; then, having lost his position, he would be obliged to look for another.

The facts at the time of injury appear to be that the wife, Julia Bentley, was not in whole or in part dependent upon her husband for support.

Held, that the wife, Julia A. Bentley, was, at the time of her husband's death, neither in whole nor in part dependent on him, and was not entitled to compensation.

The testimony by the daughter of the first wife, Ina Bentley, was corroborated by the wife of the deceased, that during the periods when her father was earning money he gave the said Ina various sums of money, stated as \$2 each time, which she in turn gave to his wife. There is nothing in the evidence to show that this help, given to the mother, was for herself or for the minor child, or for both, but the conclusion is reasonable that such money could be considered as probably to be applied for the uses of the child. The mother, as shown in the agreed statement of facts, was able to support, and did support, herself. Her labor brought her her own living and the living of the child, and, in addition, \$3.50 a week, so that this money from the husband, through her stepdaughter, when received, must have been a very welcome addition for the purpose of buying necessities in clothing and the like for her minor daughter.

Held, that the minor child, Almira Susan Bentley, was a partial dependent of the deceased Bentley, and is entitled to partial compensation "equal to the same proportion of the

weekly payments" which her father contributed for her support bore to his average weekly earnings at the time of his injury; and that this minor child, Almira Susan Bentley, is therefore entitled to a death benefit of \$1 per week for three hundred weeks from the date of the injury.

EDW. F. MCSWEENEY.

JAMES W. ROLLINS.

I find myself unable to concur with my associates in arbitration in their findings of fact, and therefore dissent therefrom.

DANIEL J. GALLAGHER.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, Pemberton Building, Boston, Mass., Wednesday, April 16, 1913, at 3 P.M., and affirms and adopts the findings of the committee of arbitration.

The Board further finds, on the statement of counsel, the evidence before the full Board and the report of the committee of arbitration, that John Ira Bentley, the employee, contributed the sum of \$2 a week for the benefit of the minor child, Almira Susan Bentley, and that the said minor child is therefore entitled to a weekly payment of \$1 a week for a period of three hundred weeks from the date of the injury, being a partial dependent under section 6, Part III. of the statute, and in accordance therewith being entitled "to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of his injury."

JAMES B. CARROLL.

DUDLEY M. HOLMAN.

DAVID T. DICKINSON.

EDW. F. MCSWEENEY.

JOSEPH A. PARKS.

Decree of Supreme Judicial Court on Appeal.

SHELDON, J. This case must be decided upon the facts found by the Industrial Accident Board in its review of the report of the committee of arbitration. (St. 1911, c. 751, Part III., §§ 5, 10, 16; and St. 1912, c. 571, §§ 12-15.) The Industrial Accident Board adopted the findings of the committee of arbitration and found some further facts. Its findings were made after a hearing of the parties, on the statements of counsel and the evidence before the full Board. The findings of fact thus made are not open to revision as such. (Donovan's Case, *ante*.) Nor, as the evidence is not reported, can it be contended that as a matter of law they were not warranted.

The wife and child of Bentley were both living apart from him at the time of his death. Accordingly neither of them was "conclusively presumed" to have been wholly dependent upon him for support. The question must be determined upon evidence of the fact as it existed at the time of the injury. (St. 1911, c. 751, Part II., § 37.) The Industrial Board has found that the wife was not dependent upon Bentley for support, but that the child was partially so. On these findings the conclusion that the wife was entitled to no compensation and that the child was entitled to receive the sum awarded to her was correct.

The decree of the Superior Court must be affirmed.

So ordered.

CASE No. 93. -

CAROLINE MILLIKEN, DEPENDENT OF FRANK T. MILLIKEN,
Employee.

A. TOWLE & COMPANY, *Employer.*

TRAVELERS INSURANCE COMPANY, *Insurer.*

SUPREME JUDICIAL COURT DECIDES THAT PERSONAL INJURY TO
EMPLOYEE DOES NOT ARISE OUT OF HIS EMPLOYMENT WHEN,
BY REASON OF AN IMPAIRMENT OF HIS MEMORY, HE WAN-
DERS TO AND FALLS INTO A SWAMP AND DIES OF PNEUMONIA,
CAUSED BY COLD AND EXPOSURE.

The employee was a driver and had been engaged during the day at his regular work, driving a delivery wagon. He was directed at 5 o'clock in the afternoon to drive his horse and wagon back to the stable. He was not seen by any one

after this direction had been given him until he was found the following morning lying in a swamp, covered with mud and water, with the exception of his head. By reason of an impairment in memory, due to a personal injury which happened some years before, he had wandered from the route which he should have followed. He was taken to a hospital, but never recovered a normal or rational consciousness, dying a few days later. He could give no explanation of where he had been or what had occurred, but spoke in a delirium only of looking for his horse. The immediate cause of his death was lobar pneumonia, caused by cold and exposure.

Held, that this was an injury arising out of and in the course of his employment.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration, Mr. Carroll dissenting.

Appealed to Supreme Judicial Court.

Decision. — The Supreme Judicial Court reverses the findings of the Industrial Accident Board.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Caroline Milliken *v.* Travelers Insurance Company, this being case No. 93 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of David T. Dickinson of the Industrial Accident Board, chairman, William C. Prout, representing the insurer, and John F. Lynch, representing the widow, heard the parties and their witnesses at the Hearing Room of the Industrial Accident Board, Thursday, Feb. 6, 1913, at 10 A.M.

The arbitrators, being duly sworn, report and find as follows: —

The evidence showed that the employee, Frank A. Milliken, a man of fifty-two years of age, had been in the employ of A. Towle & Co., the employer, as a driver or teamster for about twenty-seven years prior to the incidents which caused his death hereafter referred to.

Some four or five years ago he received an injury from an accident through falling from his wagon and striking on his head while in the course of his employment. He was a strong and healthy man before this accident, but was never so well afterwards, having particular trouble from an impairment of his memory and a gradual loss of vision of one eye.

On one occasion, in July, 1912, his power of memory failed him so completely that while driving in the course of his duties in Boston, in the daytime, he could not remember where he was or identify the places or the street in which he then was,

although he had been thoroughly familiar with the street and adjacent places and neighborhood for years. He recovered from this lapse and inability at that time in about half an hour, and was then able to continue his work.

On Oct. 8, 1912, he had worked during the day at his regular work, driving a delivery wagon, but had not called on various parties to receive bundles and packages for transportation as his duties required, and as he was expected to do, and had made several reports to his foreman, Mr. James Hennessey, that he had not received merchandise from certain regular customers because they were not ready to be taken, which reports were contrary to the facts, this being due to some failure of memory and mental powers, and said foreman had also noticed a peculiar look to his eyes and a strangeness of manner during the day. He was directed by his foreman, Mr. Hennessey, about 5 o'clock on that day to drive his horse and wagon back to the stable where they would be kept for the night. This driving to the stable for such purpose was a part of his regular work and duty.

He received this direction at 41 Matthews Street, Boston, his employer's office. The stable was located at Miller Street, Charlestown, about two or three miles away. He was seen by Hennessey a few minutes afterwards driving through Post Office Square, Boston, not far from Matthews Street, apparently driving all right in the usual route to the stable. At some place between Post Office Square and the stable in Charlestown he was seized with such a loss of memory and mental faculties that he was unable to recognize streets and places, and on account of such disordered mental condition he became lost and unable to direct the horse to the stable.

No evidence was introduced, or question suggested or raised as to intoxication, and it was agreed by the parties and found by the arbitrators to be a fact that his memory was lost and his mind and faculties disordered without fault of his own, and that he thereby lost his sense of locality, places and distances. He drove the horse while in this condition through some streets or ways until he was seen by a witness in Burlington, Mass., in a narrow private way at about 11 o'clock P.M., riding around in the dark. He apparently wanted to get out of this private

way onto the road, and the witness assisted him with a lantern in so doing, and directed and saw him drive away toward Lowell. The witness could not get Milliken to speak at all.

He was not seen by any one after this driving the horse and wagon, and was found the following morning at about 6 o'clock by parties who heard him crying out, lying in a swamp or brook in the city of Woburn, covered by mud and water, with the exception of his head. His hat was found on an adjacent road about 200 feet distant, and the horse, attached to the wagon, was found standing by the side of said road about half a mile distant in the direction of Boston.

Milliken was taken to a hospital in Woburn and attended by physicians, but never recovered a normal or rational consciousness. He died a few days later at said hospital on October 14. He could give no explanation of where he had been or what had occurred, but spoke in a delirium only of looking for his horse.

The immediate cause of his death was lobar pneumonia caused by cold and exposure while lying in the swamp and water, as above described, and during the night preceding. A condition of paralysis was also observed on one side of his body while he was at the hospital before his death, due to a hemorrhage in the brain. In the opinion of the physician who observed his condition before his death, this hemorrhage and paralysis were caused by the exposure and cold while in the swamp, which had induced a congestion of blood in the brain, and the committee finds that both said hemorrhage and pneumonia were caused by said cold and exposure. In the opinion of the attending physician, the deceased might have lived years afterwards so far as the effects of the hemorrhage and paralysis were concerned, and the actual cause of the death was the pneumonia, as above stated.

The committee finds that the wanderings of the deceased commenced while driving on his way from Post Office Square to the stable, as aforesaid, in the course of his duties, and that his subsequent wanderings were in the course of an effort to find the stable and get his horse to it for the purpose of putting him there for the night, and that his work and duties as driver, and the matters and forces with which he was dealing and sub-

ject to at the beginning of and during his mental disorder, particularly the horse and wagon, were contributing causes to the occurrences and conditions which brought about his death, and without which contributing causes his death would not have occurred. The committee, therefore, finds that his injuries and death arose out of and in the course of his employment.

The committee finds that his average weekly wages at the time of receiving his injuries and death were \$13; that he left a widow, Caroline Milliken, who was wholly dependent upon his earnings at the time of said injury and death, and that she is entitled to a weekly compensation of \$6.50 for a period of three hundred weeks, dating from Oct. 9, 1912, the date when said injury was received.

DAVID T. DICKINSON.

JOHN F. LYNCH.

Dissenting Opinion.

I respectfully dissent from the findings of the Board in the above case, for the following reasons:—

1. That pneumonia is not a personal injury within the meaning of the act.

2. That it does not appear that the death of the employee arose out of his employment or can be attributed, even indirectly or in part, to it.

Assuming that the illness commenced while the employee was in the course of his employment, nothing more has been shown than that it was coincident with such employment. It has not been shown that the injury “arose out of” as well as “in the course of” his employment, as provided by the act. All the evidence shows that the sole cause of the misfortune was the mental condition of the employee on the afternoon or evening preceding his wandering away, and that but for such mental aberration what subsequently happened could not have occurred.

Further, all the evidence, including the medical testimony, shows that the man’s mental condition did not arise out of his employment. Since it appears that the illness cannot be traced, either proximately or remotely, to the man’s employment, I am forced to dissent from the finding of the majority of the Board.

3. Although there is very little dispute as to the facts, I find that the statement of the majority of the Board is not strictly in accordance with the testimony in one or two particulars which, however, may not be decisive. I refer especially (1) to the testimony concerning the action of the employee during his last afternoon's employment, upon which the evidence was conflicting, and I doubt if any of it went quite as far as found by the Board; (2) the statement of the medical testimony, which the Board finds was to the effect that the exposure of the employee caused paralysis, cerebral hemorrhage and pneumonia, which is not my recollection of his testimony, although probably not of great importance.

WILLIAM C. PROUT.

Findings and Decision of the Industrial Accident Board on Review.

After due hearing and argument of counsel, the Industrial Accident Board affirms and adopts the findings of the committee of arbitration, except as follows, and further expressly finds and decides: —

That the loss of memory with which the employee, Milliken, was seized was not in itself a fatal disorder, and that he would not have met his death as he did but for the horse and wagon and his effort to get them to the stable. The case was not one of those in which an employee was on a lark, errand or purpose of his own, but seems to be within the principle of *Sneddon et als. v. The Greenfield Coal & Brick Co.*, 3 Butterworth, W. C. C. 557; *Wicks (or Wilkes) v. Dowell*, 2 K. B. 225; 74 L. J. K. B. 572; *Parsons and Allen*, Workmen's Compensation Act, 4th edition, p. 10; *Milton-Senhouse*, Vol. VII., p. 14; and *Clover, Clayton & Co. v. Hughes*, A. C. 242; 26 T. L. R. 359; *Parsons and Allen*, Workmen's Compensation Act, 4th edition, p. 10; 3 Butterworth, W. C. C. 275.

In the *Sneddon* case a miner got lost in an underground passageway, and after traveling a long distance in an effort to find his place of work met with an accident which caused his death. It was held that his death arose out of and in the course of his employment. In the *Clover, Clayton & Co.* and

Wicks (or Wilkes) cases (*supra*) it was held that where the death was due to the combined cause of the employment and a personal infirmity, and would not have happened without the operation of both causes, the death arose out of and in the course of the employment. Although the English act, unlike the Massachusetts law, requires that the injury must result from "accident," it seems that the injury in the case at bar would be held by the English courts to have resulted from an accident.

The following cases defining the scope of employment may be pertinent as showing that Milliken was performing his duty at the time of his falling into the brook in an endeavor to find his way out of the road and get back to the stable. (Hayes v. Wilkins, 194 Mass. 223; McCarthy v. Timmins, 178 Mass. 378 at 381.)

In the latter case the court states, after referring to the fact that the driver had been directed to go to the stables, as follows: —

There can be no doubt that so long as he drove the team with that end in view and for that purpose and for no purpose of his own, he was engaged in his master's business, even 'if he made a detour contrary to the direction of his master.

It has been suggested in the present case that Milliken's employer might not have been liable if Milliken, by reason of the mental condition he was in, had driven over and injured a person in the highway, and that this therefore shows that Milliken was not then driving in the course of his employment. But the reason that there might be no recovery against the master in such case would not be that Milliken was not acting in the course of his employment, but 'that negligence could not be shown in the acts of Milliken on account of his mental condition. The ground of liability under the Workmen's Compensation Act is that an injury simply arose out of and in the course of the employment, whereas in a suit at law it is based on the master's negligence. Furthermore, if the horse was the cause of Milliken being carried to the place of injury, as it undoubtedly was, as Milliken was hardly more than an automaton in what he did in driving, the injury must be held to have

arisen out of his employment, because this was the danger to which he was exposed by his employment at the time of his abnormal mental seizure. His subsequently being carried from where he wished to go was just as much a matter of chance and accident as if the horse had been running away, in which latter case there would seem to be no doubt that the accident or injury would have arisen out of his employment.

DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

Dissenting Opinion.

I am unable to agree with the majority of the Industrial Accident Board in this case because I do not think it can be found that the injury arose out of and in the course of Mr. Milliken's employment. In order to entitle an employee to recover under the Workmen's Compensation Act he must at the time of the injury be engaged in the services and employment of his employer, and the employment must be the cause or the occasion of the injury. At the time Mr. Milliken met with his injury and death he was not on any business of his employer. Whatever caused him to depart from the sphere of his duties, whether the departure was intentional or not, he was not engaged in doing work for which he was hired, and it cannot be said that any instrumentality belonging to his employer brought him into this place of danger so far removed from any place where his employment called upon him to be. If, through loss of memory or some defect of mind, or from any other such cause, he was taken outside the course of his work he cannot charge the employer for the consequences. Neither can it be said in a case like this that his employment occasioned his injury and death.

JAMES B. CARROLL.

Decree of Supreme Judicial Court on Appeal.

LORING, J. This is an appeal from a decree of the Superior Court based on a decision of the Industrial Accident Board,

ordering the insurer to pay \$1,950 for the death of Frank T. Milliken. The facts found by the Board were these: —

Milliken, at the time of his death in October, 1912, and for some twenty-seven years before that time, had been a driver in the employ of A. Towle and Company, the insured, who were teamsters. Some four or five years before his death Milliken, in the course of his employment, fell from his wagon, striking his head. This caused *inter alia*, an impairment of memory. One afternoon in July, 1912 (three months before his death), Milliken lost his memory while driving his employer's wagon in Boston, and for half an hour was unable to remember where he was or to identify the streets in which he was driving, although they were streets with which he was "thoroughly familiar." During the day of Oct. 8, 1912, from a similar failure of memory, Milliken did not call for packages as his duties required, and reported (contrary to the fact) that he had not received them because they were not ready. Thereupon he was directed to drive his wagon to his employer's stable in Charlestown to be put up for the night. Driving his wagon to the stable for the night was part of Milliken's regular work. This order was given to Milliken about 5 o'clock in the afternoon at his employer's Boston office in Matthew Street, near Post Office Square. "At some place between Post Office Square and the stable in Charlestown he was seized with such a loss of memory and mental faculties that he was unable to recognize streets and places, and on account of such disordered mental condition he became lost and unable to direct the horse to the stable." About 11 o'clock that night Milliken was seen driving the wagon in a private way in Burlington, and was helped back to the public highway, whereupon he drove away in the direction of Lowell. At this time Milliken would not speak. At about 6 o'clock the following morning Milliken was found lying in a swamp in Woburn and — with the exception of his head — covered with mud and water. His hat was found on the "adjacent road" some 200 yards away, and the horse and wagon were found "by the side of said road, about half a mile distant in the direction of Boston." Milliken was taken to a hospital at Woburn, where he died on October 14 without recovering his memory. He

"spoke in a delirium only of looking for his horse." The cause of his death was pneumonia, brought on by cold and exposure while lying in the swamp.

The Industrial Accident Board found "that the loss of memory with which the employee, Milliken; was seized was not in itself a fatal disorder, and that he would not have met his death as he did but for the horse and wagon and his effort to get them to the stable."

The dependent's contention is that Milliken's death was caused by pneumonia brought on by his falling into the swamp and lying there all night; that falling into the swamp and lying there all night was a personal injury which caused his death; and for this she relies on *Alloa Coal Co. v. Drylie*, 50 S. L. R. 350, and *Kelly v. The Auchenlea Coal Co.*, 48 S. L. R. 768.

The fact that Milliken "would not have met his death as he did but for the horse and wagon and his effort to get them to the stable," goes no farther than to show that it was a personal injury suffered by Milliken "in the course of his employment."

The difficulty in the case arises from the provision that the personal injury must be one "arising out of" as well as one "in the course of his employment."

It was held in *McNicol's Case*, 215 Mass. 497, that the provision limiting the personal injuries for which compensation is to be made to those "arising out of" the employee's employment means that the nature and conditions of the employment must be such that the personal injury which in fact happened was one likely to happen to an employee in that employment. In that case it was said that there must be a "causal connection" between the employment and the injury.

There is nothing in the employment of driving a wagon which makes it likely that the employee will alight from his wagon, wander to and fall into a swamp, and lie there all night. The distinction between the case at bar and a case within this clause of the act is well brought out by what is suggested by a remark of the majority of the Industrial Accident Board. If the horse driven by Milliken had run away and Milliken had been thereby thrown out and killed, the personal injury in fact suffered in that case would have been

one which from the nature of his employment would be likely to arise, and so would be one "arising out of his (the employee's) employment." But as we have said, there is nothing in the employment of driving a wagon which makes it likely that the employee will alight from his wagon, wander to and fall into a swamp, and lie there all night. *Sneddon v. Greenfield Coal & Brick Co.*, 47 S. L. R. 337, much relied on here by the dependent, is another case which brings out the distinction. There a miner got lost in the underground ways of a mine and was killed by the exhaust steam from an engine which was not fenced off. (See also *Wicks v. Dowell & Co.* (1905), 2 K. B. 225.)

We find nothing in the other cases relied on by the dependent which calls for notice.

It seems plain that if Milliken's death was caused by a personal injury it was one which happened some four or five years before the occurrence here complained of and before the Workmen's Compensation Act was passed. At that time he fell from his wagon and striking on his head suffered as a result "an impairment of his memory."

The decree of the Superior Court based on a decision of the Industrial Accident Board appealed from is reversed, and a decree should be entered declaring that the dependent has no claim against the insurer.

So ordered.

CASE No. 149.

PATRICK MCCARTHY, *Employee.*

APSLEY RUBBER COMPANY, *Employer.*

LONDON GUARANTEE AND ACCIDENT COMPANY, LTD., *Insurer.*

CHAIN OF CAUSATION BROKEN BY A NOVUS ACTUS INTERVENIENS. EMPLOYEE INCAPACITATED BY REASON OF THE INJURY BECOMES INSANE. COMPENSATION WITHDRAWN WITH RIGHT TO RENEWAL IF INCAPACITATED AFTER RESTORATION TO SANITY.

The employee received a personal injury arising out of and in the course of his employment which necessitated the amputation of the thumb and fingers of his right hand. A few days later he suffered from alcoholic insanity and was taken to the Westborough Insane Asylum, where he remained five days. He

then abstained from the use of alcohol for a period of about six weeks and again began drinking. This brought on another attack of insanity and the employee became totally incapacitated for work by reason of said insanity.

Held, that the employee was not entitled to compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to the Supreme Judicial Court.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Patrick McCarthy *v.* London Guarantee and Accident Company, this being Case No. 149 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of David T. Dickinson of the Industrial Accident Board, chairman, Dr. Walter A. Jillson, representing the employee, and N. P. Sippelle, Esq., representing the insurer, after being duly sworn, heard the parties and their witnesses at Selectmen's Room, Town Hall, Hudson, Mass., Thursday, April 3, 1913, at 11 A.M.

The committee finds that the above-named employee received an injury in the course of and arising out of his employment on Dec. 9, 1912, by reason of his right hand being so crushed by a pressing machine operated by him in the course of his work while with the above-named employer, Apsley Rubber Company, that it was necessary to amputate the thumb and fingers of the hand.

On Sept. 15, 1905, this employee had been treated at the Westborough State Insane Asylum for alcoholic insanity, and had been discharged as recovered after staying in the institution four months.

He had been, before and since that time up to the date of the accident and injury above named, a user of intoxicating liquors to some extent at some time in each week during these years. There was no evidence that he went on sprees or that he had been before the courts for drunkenness other than in connection with his commitment to the Westborough Asylum on Sept. 15, 1905.

He appeared to be a more or less regular drinker to an extent that did not interfere with his work. There was no evidence

that he had suffered any ill effects therefrom up to the time of this accident other than the commitment above named, and for eighteen months prior to this accident the foreman of his employer testified that this employee had not to his knowledge lost a day from work through the effect of liquor.

On Dec. 12, 1912, three days after the accident, and while suffering from the pain and shock following the surgical operation, he became delirious and maniacal, in a state of alcoholic insanity. This condition of insanity was due to the effects of the injury, and would not have come to him but for the injury. The medical testimony agreed on this, and the committee so finds. From the time of the injury up to this outbreak of alcoholic insanity he had drunk no intoxicating liquor.

He was sent for treatment by his physician for this alcoholic insanity, when attacked with it, on Dec. 12, 1912, to the Westborough Asylum, and was there received and treated, and was discharged therefrom five days later. His physician, Dr. Norman M. Hunter of Hudson, Mass., testified that after examining and conversing with him on this date, Dec. 17, 1912, he appeared to be sane and to have recovered, so far as his fit of insanity was concerned; and that he could not conscientiously sign a certificate stating that he was then insane.

The physician at the asylum, however, believed on Dec. 17, 1912, that the man ought to remain in the care of the institution somewhat longer, but upon the information of Dr. Hunter being communicated to the judge of the local court, he was not committed for further care or custody to the institution.

During the week prior to Jan. 29, 1913, the injured man drank liquor on one or more days, although he had been warned by Dr. Hunter not to drink any liquor, so that he was considerably intoxicated thereby, and on Jan. 29, 1913, had another violent and maniacal attack of alcoholic insanity, and was committed that day by the local court as an insane person to the Westborough Asylum. In Dr. Hunter's opinion the injured hand was all healed so that he could use it on said Jan. 29, 1913. He was still under the care and control of that institution on the day of the hearing, viz., April 3, 1913.

He appeared and gave testimony as to his condition at the hearing in company with a physician from the asylum. He

appeared at the hearing to be thoroughly rational and readily responsive to all questions and desirous of returning to such moderate or light work as his former employer could offer him, and his employer through his superintendent thought that such work could be given him.

The wounds of his injured hand at this time were well healed. In the opinion of his attending physician from the asylum, however, he was not in a suitable condition mentally to take care of himself or be discharged from the institution, and it was the opinion of this attending physician that he would have to be taken care of as a "public charge" indefinitely.

The committee finds that this employee had recovered on Dec. 17, 1912, from his insane attack of Dec. 12, 1912, which was due to the injury on Dec. 9, 1912, and that his subsequent outbreak of alcoholic insanity on Jan. 29, 1913, was due to his use of intoxicating liquors during the week preceding, as above stated, for which he was responsible; that he was wholly incapacitated for work by reason of his physical incapacity up to Feb. 16, 1913; that he was then, on said February 16, partly incapacitated for work by reason of his physical injury to the right hand; that his average weekly wages at the time of the injury were \$10; and that he was entitled to a compensation of \$5 per week for total incapacity from Dec. 23, 1912, to Feb. 16, 1913, viz., eight weeks, amounting to \$40, which has been paid.

The committee finds that his total incapacity ceased on said Feb. 16, 1913. It further finds that there was due him for the loss by severance of his fingers and thumb \$5 per week for a period of twenty-five weeks, and that he has been paid therefor sixteen weeks, — viz., up to March 31, 1913, — and that there is due for this additional compensation \$5 per week for the balance of said period, viz., nine weeks, said balance of additional payments amounting to \$45 to expire June 2, 1913, and that this additional compensation has been fully paid at the time of filing this report.

The committee finds that the average weekly wages that said employee is and has been able to earn since said Feb. 16, 1913, as a result of the loss of his fingers and thumb, are \$5, and that he is entitled to compensation at the rate of \$2.50 per week

from said Feb. 16, 1913, during the continuance of such partial physical incapacity.

Walter A. Jillson of Westborough was appointed before the hearing a "next friend" for said employee in his proceedings for compensation, and said Walter A. Jillson accepted and appeared in said proceedings as said "next friend."

DAVID T. DICKINSON.
N. P. SIPPRELLE.

Walter A. Jillson dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties and their witnesses at the Selectmen's Room, Town Hall, Hudson, Mass., on Wednesday, Nov. 12, 1913, at 10.30 A.M.

Patrick McCarthy, the injured, did not appear at the hearing because he was incapacitated, but was represented by George W. Ryley, Esq., 39 Court Street, Boston, as counsel, and Dr. Walter A. Jillson, Westborough Insane Hospital, Westborough, as next friend. There was no question involved as to weekly wages or the fact that he was injured.

It is agreed that compensation is due to the employee, amounting to \$165, covering specific compensation for the loss of his fingers and disability compensation up to the time he was committed to the insane hospital, the question for decision being whether he is entitled to any compensation on account of his incapacity to work, and if so, to what extent, for the period following his commitment to the Westborough Insane Hospital.

Patrick McCarthy on Dec. 9, 1912, while in the employ of the Apsley Rubber Company, had his right hand so crushed by a pressing machine that it was necessary to amputate the thumb and fingers of the hand. On the 12th of December, 1912, he suffered an outbreak of alcoholic insanity, and on the same day, was taken to the Westborough Insane Asylum, where he remained until the 17th of December, 1912. After this he abstained from alcohol, until a few days before Jan. 29, 1913,

when he began drinking again, and on Jan. 29, 1913, had a second attack of alcoholic insanity.

It was the contention of the employee that the injury lighted up or increased the tendency to insanity; that being a drinking ~~man~~ the insanity would not have occurred if it were not for the injury he received and the consequent shock to his system; that the second outbreak on Jan. 29, 1913, was also caused in the same way; and that when he left the hospital on the 17th of December, 1912, he was not cured. It was also his contention that being deprived of his fingers and thumb he had become incapacitated for labor, and that he was entitled to compensation because of this disability, notwithstanding the fact that he was also incapacitated because of the insanity.

It was the contention of the insurer that there was no causal relation between the outbreak of insanity on Jan. 29, 1913, and the accident; that during the period intervening from Dec. 17, up to Jan. 29, 1913, he was perfectly normal and rational, and there was nothing in his speech or conduct to indicate that there was anything wrong, and further, when he left the hospital, Dec. 17, 1912, he was cured.

It was not disputed by the insurer that the employee was entitled to the specific compensation for the loss of his fingers, to wit, for twenty-five weeks at \$5 a week.

The material evidence was substantially as follows:—

Dr. Norman M. Hunter of Hudson testified that he was called to the factory to attend McCarthy the day of the injury. Apparently the hand was mangled, with the fingers completely gone and part of the thumb. He applied the emergency treatment and then took him to the hospital where he was operated on and the fingers and thumb amputated. He attended him until the morning of the 12th of December, 1912, when the matron at the hospital said McCarthy could not be controlled. He found him with symptoms of "delirium tremens." Judge McDonald was out of town and there were no facilities at the hospital to take care of him. He talked with Judge Boudrot and he suggested a seven-days' commitment. On this day, Dec. 12, 1912, he was sent to the Westborough Hospital. On the 16th of December, 1912, he received a letter from the hospital saying he could only keep McCarthy there seven days and

would have to remove him at the end of that time, or recommit him. Judge McDonald was still out of town, and he tried to get Judge Fowler to examine him, but this was not the judge's way of doing things, and he said the examination would have to be made at the office of Judge McDonald. He examined McCarthy at this time, and told Judge McDonald, over the telephone, that he could not find anything to commit him again, and could not swear that McCarthy at this time was insane and not a proper person to be at large. On the 17th of December, 1912, he brought McCarthy back to Hudson, although at the Westborough Hospital they said it was better to have him recommitted. He dressed his wounds up to Dec. 22, 1912, as he thought after that he did not require any more dressing. He may have dressed them once or twice after that. McCarthy had abstained from liquors during the time he was dressing his hand up to about the middle of January. The next time he was called to see him he was told that he acted like a wild man. He was very wild at this time, and there were three or four men sitting on him trying to keep him quiet. He was committed this day, Jan. 27, 1913, to the Westborough Insane Hospital. He inquired what Mr. McCarthy's habits had been for the last ten or twelve days and was told that for the past day or two he had not been drinking, but for a week or two previous he had been drinking. Since the commitment on the 27th or 28th of January, 1913, he has had nothing to do with him. The accident and operation were causes for the first outbreak. During the time between the first and second outbreak he appeared to be in general good health and to be coming along pretty well. He does not consider that the last outbreak in January was in any way traceable to the accident. Up to the middle of January, when he was not drinking, he was normal. Disregarding the alcoholic insanity, he would think that by the end of January or some time in February, McCarthy would have been able to do some kind of work. So far as he knows, during the spare time after his first commitment, he took walks and used to stay in the boarding house.

Dr. Walter J. Jillson of the Westborough Insane Hospital testified that Mr. McCarthy first came under his care on the twelfth day of December, 1912, when he was first admitted.

From his examination and observations of McCarthy while at the hospital in December, he would say he was suffering from alcoholic insanity. As is the custom, Dr. Hunter was notified that McCarthy must be removed at the end of seven days or be regularly committed. In this same letter, Dr. Hunter was advised that he should leave McCarthy there as he was not recovered. He was discharged five days after admission and given into the charge of Dr. Hunter, but both Dr. Jordan and himself advised that he should be regularly committed. They did not consider him recovered, only improved. The next he heard of him was Jan. 29, 1913, when he was regularly committed, suffering from another outbreak, similar in nature to the one in December. He is now suffering from chronic alcoholic insanity, and his mind is apt to be defective for all time. It is his opinion that McCarthy was rendered insane by reason of the injury as an exciting cause, and that he continued insane when discharged from the hospital in December, 1912, and was mentally irresponsible; that this mental irresponsibility continued up to the present time; and that maniacal excitement was due to alcohol which he had had opportunity to get and for which he was irresponsible in getting. Previously McCarthy was in the Westborough Hospital on Sept. 15, 1905, but according to the hospital records had not been there since, until December, 1912.

Dr. Harry H. Colburn, 103 Mt. Vernon Street, Boston, testified that he had never seen Patrick McCarthy, but that he specializes in his work, more or less, with mental conditions. He did not think that the outbreak in January could result from the accident in December, 1912, because of the fact that he was observed by Dr. Hunter, who had knowledge of his condition, and did not distinguish anything abnormal about him, and also from the fact that no accident, unless a trauma on the head, could produce insanity. It is possible that the effects of the accident, so far as the mental condition is concerned, had entirely disappeared by the 17th of December, 1912. He does not think that the accident was the cause of this mental disturbance, and from the evidence he should think that on December 17, 1912, he was mentally responsible.

Ernest Dunbar, assistant superintendent of the Apsley Rub-

ber Company, testified that McCarthy worked in the factory, but under a foreman. He usually saw him every day, but there was never anything about him to call attention any more than another man. He saw him after the accident, just before he was taken to the hospital, and saw him two or three times afterwards, when he came to the mill, with his hands bandaged, to inquire about his compensation from the insurance company. As he recalls it, these visits were between the first and second commitment, and at that time there was nothing unusual about his appearance. He does not recall that he gave McCarthy any money, but as a rule he would be sent to the postmaster. He thinks at the factory there are one or two positions, such as picking over paper, or picking up scraps, which a man in his condition might be able to do. He would first have to make application for such a place and it would be considered. These men get \$9 a week. They do not have vacancies very often in these positions, and there has not been any vacancy since McCarthy was injured. This is all he knows that could be given to McCarthy. He would not create a position for him and could not hire a man to fill a position they did not have. The effort he would make to help McCarthy would be to inquire if the positions they had were vacant. They have over 900 employees, and there would be only three or four positions open to a man with an injury such as he received. In hiring a man for a position, the chances are he would hire a man with two hands.

Upon this evidence, we find that there was no causal connection between the outbreak of insanity on Jan. 29, 1913, and the injury of Dec. 12, 1912; that during the period intervening between the 17th of December, 1912, and the 29th of January, 1913, he was rational and cured; and if it was not for his indulgence in the use of intoxicating liquors to excess the insanity which now renders him helpless would not have occurred. We therefore find on this evidence that he is at present unable to work or labor because of his alcoholic insanity. If Mr. McCarthy had not become insane, and was totally incapacitated for work by reason of his injury, he would be entitled to one-half his wages while the total incapacity continued within the limitations of the Workmen's Compensation Act; and if par-

tially incapacitated by reason of this injury he would be entitled to compensation according to his ability to earn wages based upon "one-half the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter." But a new act has intervened. He has become afflicted with a new disease, — a disease which in our opinion was independent of his injury, and not connected therewith, which disease has incapacitated him for labor, and this being so, we have no way by which to determine how much, if any, of his incapacity to work can be attributed to the injury arising out of and in the course of his employment, as distinct from the disease which shows him to be totally incapacitated.

There was no evidence in the case to satisfy us that because of the injury to his hand he would be incapacitated for earning wages, and to what extent he would earn them if he had not received this injury. It is probable that he would have difficulty in securing employment, and if he did secure employment it would be at a reduced wage because of the injury to his hand; but we have no evidence upon which to base a finding awarding him compensation because of the incapacity to labor resulting from the accident. On the other hand, the evidence clearly shows that because of the disease he is totally incapacitated. (*Humbler Towing Company v. Barclay*, 5 B. W. C. 142.)

In *Harwood v. Wyken Colliery Company, Ltd.*, 6 B. W. C. 225, the incapacity for work was due to two causes. The employee was permanently incapacitated by reason of an injury to his knee, and he also suffered from heart disease which did not result from the injury, and which of itself would have totally incapacitated him for work. The injury occurred in October, 1911, and compensation was paid to May 20, 1912, at which latter date heart disease supervened, the employee not having, however, recovered from the injury to his knee. It was held in this case that the employee was entitled to compensation, no new act having intervened.

The Board finds that the incapacity for work, in the case before it, arises from the insanity of the employee, and was caused by reason of his own act, independent of the injury received by him. If compensation is due the said employee under

these circumstances, then any intentional act of violence or misconduct on the part of the employee which renders him incapable of work will operate in the same way. As was said by the Lord President, in the case of *Malone v. Cayzer, Irvine & Co.*, 1 B. W. C. 27, at page 31: "If the chain of causation is broken by a 'novus actus interveniens,' so that the old cause goes and a new one is substituted for it, that is a new act which gives fresh origin to the after-consequences." And by Lord M'Laren, in the same case, at page 33: "If, for example, a man in consequence of the loss of his sight took to drinking and shortened his life by intemperance, that would be a very clear case for not giving compensation, because, although death in a sense was the result of the injury, it was not a material but a moral result."

The Board therefore finds that the said employee is not entitled to compensation, being totally incapacitated for work by reason of insanity, and not by reason of the personal injury received by him on Dec. 9, 1912. Inasmuch as it is possible that he may be restored to sanity, the Board reserves to the employee the right to apply for an award based upon any incapacity for work which may exist as a result of the said personal injury, in accordance with the provisions of the Workmen's Compensation Act.

The parties agreeing, without question, that the sum of \$165 was due under the act, and the insurer having paid \$40 on account, the Board finds that there is due Walter Jillson, next friend, for the benefit of said employee, the sum of \$125.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
JOSEPH A. PARKS.

CASE No. 150.

JOHN CRIPPS, BY JULIA CRIPPS, WIDOW, *Employee*.

DAVID B. COGAN, *Employer*.

ÆTNA LIFE INSURANCE COMPANY, *Insurer*.

**SIGNING OF COMMON-LAW RELEASE BY EMPLOYEE DOES NOT
OPERATE TO DEPRIVE THE WIDOW OF HER RIGHTS UNDER
THE WORKMEN'S COMPENSATION ACT. SUPREME JUDICIAL
COURT AFFIRMS DECISION OF BOARD.**

The employee, while driving a truck belonging to his employer, was struck by a car of the Boston Elevated Railway Company, being thrown to the street and sustaining injuries to his back and right side. An adjuster for the Elevated called upon him on the afternoon of the day of the injury and obtained a release, the consideration being a payment of \$20. The employee returned to work and about three months later was obliged to report at the City Hospital for treatment, an abscess having developed on the right hip. Several weeks later he died. The widow claimed compensation under the Workmen's Compensation Act.

Held, that the death of the employee was due to an injury arising out of and in the course of his employment, and that the widow is entitled to compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to Supreme Judicial Court.

Decision. — The Supreme Judicial Court affirms the findings of the Industrial Accident Board.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of John Cripps, employee, by Julia Cripps, widow, *v.* Ætna Life Insurance Company, this being case No. 150 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Edward F. McSweeney, chairman, representing the Industrial Accident Board, Daniel D. Donovan of Boston, representing the employee, and William W. Risk of Boston, representing the insurer, heard the parties and their witnesses at the Hearing Room of the Industrial Accident Board, in the Pemberton Building, Boston, Mass., Monday, March 24, 1913, at 10 A.M.; at Room 926, Tremont Building, Boston, Tuesday, March 25, 1913, at 2 P.M., and Monday, March 31, 1913, at 2 P.M.

John H. Cripps, the employee, died, leaving a wife, Julia Cripps, and six children, all under eighteen years of age. He was employed by David B. Cogan, engaged in the general trucking and teaming business, at 33 Howard Street, Boston, who had his employees insured under the Workmen's Compensation Act in the Ætna Life Insurance Company. The average weekly wages of Cripps were \$13.50.

On Wednesday, Oct. 23, 1912, about 7.45 A.M., Mr. Cripps was driving a truck belonging to Cogan, and was struck at the corner of Reading and Southampton streets, Boston, by a Neponset car, No. 1578, of the Boston Elevated Railway Company, throwing him to the street, injuring his back and right side.

After the collision, Cripps took his team back to the stable and went to his home, 57 Batchelder Street, Roxbury. On the afternoon of October 23 Mr. P. H. Titus, employed by the Boston Elevated Railroad Company as an adjuster of claims, called at the home of Cripps, and on the payment to him of \$20 he signed a release against the Boston Elevated Railroad.

Cripps returned to work on the Monday following his injury, and continued to work until Jan. 13, 1913, when he had pains in his side, and consulted a doctor. He went to the City Hospital on Jan. 21, 1913, where he was treated for an abscess of the right hip, which gradually grew worse until February 12, when he died.

Held, that the death of John H. Cripps was due to an injury arising out of and in the course of his employment, and that the cause of the injury and death was the collision above described.

On or about the 19th of February, 1913, this case was brought to the attention of the Industrial Accident Board, it being represented to them that the widow, Julia Cripps, and her six children were destitute. Because of the payment of the \$20 by the Elevated Railway Company to Cripps, the Ætna Life Insurance Company refused to pay compensation under the Workmen's Compensation Act. Mr. Edward F. McSweeney, a member of the Industrial Accident Board, called this matter to the attention of Mr. Russell A. Sears, general attorney for the Elevated road. Mr. Sears' testimony as to the facts is as follows: —

Some three or four weeks ago, the exact date I do not recall, I had a conference with Mr. McSweeney, and for the first time of my own knowledge these facts came to my attention. It was represented that Mrs. Cripps was left a widow with four or five small children of tender age and that our company had already taken a release from Mr. Cripps during his life and Mr. McSweeney asked me if we would make a contribution toward her assistance. After a day or two I wrote a letter to Mr. McSweeney in which I told him that our company would make a contribution of \$500, to be paid through such person as he might name, or board, the first payment to be \$100 and after that time in remittances, weekly, until the sum of \$500 was paid. Now I think after that a letter was sent by Mr. McSweeney acknowledging that letter in which he said he wanted to confer with the Board about it. After a conference with Mr. Morris, the matter was left in the form that we would be willing to pay \$500, notwithstanding the fact that Mrs. Cripps would undertake to pursue her remedy, if any, against the insurance company, or Mr. Cripps' employer, for compensation, and one of these payments has already been made through Bishop Anderson.

Q. Now, Mr. Sears, did the widow sign any release of any kind running to the L? A. Mrs. Cripps? Never.

Q. Did she sign any release at all? A. No.

Q. Then the L has no release of any kind in connection with this accident except the release signed by Mr. Cripps? A. That's all.

Q. Mr. Sears, have you ever seen Mrs. Cripps? A. No.

Q. Have you ever met anybody representing her? A. No.

Q. Has any claim been made on you by Mrs. Cripps or anybody representing her on account of this accident? A. No.

Q. And excepting Mr. McSweeney, has anybody, and Father Alchin, has anybody seen you with reference to Mrs. Cripps about this case? A. No.

Q. Or on account of any liability existing towards Mrs. Cripps? A. No.

Q. Whether or not this money was given by you upon representations by Mr. McSweeney on account of the impoverished and necessitous condition of Mrs. Cripps? A. That was the reason.

Q. It was given by you as a pure gift, except that you asked Mr. McSweeney to see that in case the insurance company sought to recover over against you that the money should be returned to you as a loan? A. That was it.

Q. It was purely in the nature of a gift? A. That's all.

Q. No writing, paper or anything in the way of recognizing any claim or release was ever offered or asked for? A. No.

It was the contention of the Ætna Life Insurance Company that it was not bound to pay the dependent widow, Julia

Cripps, the benefit provided for by the Workmen's Compensation Act on three grounds:—

1. That the release by John H. Cripps to the Boston Elevated Railway Company constituted an election under section 15, Part III. of the Workmen's Compensation Act, and this deprives his dependent widow and children of any rights under the act.

2. That the \$500 paid to Bishop Anderson by the Boston Elevated Railway Company for the benefit of the widow constituted an election of the widow against a third party, which deprives her of any rights under the Workmen's Compensation Act.

3. That Cripps was not in fact insured under the Workmen's Compensation Act, his employer not being David B. Cogan, who is insured under the act in the Ætna Life Insurance Company, but one Gilbert D. Pierce, to whom Cogan was alleged to have sold his business of teaming and trucking.

That Cogan was not the employer of Cripps at the time of his injury, David B. Cogan testified that he had a warehouse business at 468 Blue Hill Avenue, Dorchester, and he bought this warehouse in April, 1911. He went into the teaming business in 1899, and worked at it until he found "it was getting too much for him." Having a chance to buy a storage warehouse on Blue Hill Avenue, he bought it in 1911, and sold out his trucking and transfer business some time between April and June, 1911, to Gilbert D. Pierce. No papers were passed until Aug. 31, 1912, and no money, either by way of principal or interest, has ever been paid by Pierce to Cogan.

Mr. Cogan testified that in August, 1912, fourteen months after he claimed to have sold the business to Pierce, he delivered to him a bill of sale and "had a little bother down town," and "I was told that it was well to protect myself by having a bill of sale. This is all a friendly matter with me and Mr. Pierce."

It was testified that while Cogan claimed he had no interest in the business after June, 1911, on two separate occasions when Pierce was sick for a considerable period, Cogan was in charge of the stable and transfer business. In August of 1912 Pierce filed in the city hall a certified copy that the business of Cogan

had been transferred to himself, but that otherwise no publicity had been given as to the change of ownership.

Gilbert D. Pierce, residing at 68 Blue Hill Avenue, said that his business was the Cogan Transfer Company, teaming trunks, theatrical baggage, etc., and was the owner of this since June 12, 1911, and in general corroborated the statements made by Mr. Cogan. He further testified that he was sick for a long period on two occasions, and that Cogan had taken care of the business; that he had never told the public that Cogan's business had changed hands; that he never told his employees that the business had changed hands, but that he would have told them if they had asked, and that he had often said to his employees, "I am running this business, not Cogan." When Cripps was injured he was covered by a policy of Workmen's Compensation insurance in the Aetna Life Insurance Company, issued in the name of David B. Cogan, through the insurance broker's office of Mr. Davidson, and covering the business in which Cripps was employed at the time of the injury. The policy for insurance under the Workmen's Compensation Act being taken out in Cogan's name was not intended to evade the payment of insurance to Cripps or any other injured employee. Earl E. Davidson, an insurance broker, testified that he placed a liability insurance policy for David B. Cogan on his transfer business in 1904, which policy had been renewed from year to year at the Aetna Life Insurance Company, sometimes at Mr. Cogan's request and at other times the renewed policy was sent to him and Cogan sent a check which settled the matter as far as Davidson was concerned up to October 23. Mr. Davidson further testified that he had no reason to know and did not know that there had been any change in the ownership of the Cogan business. When the policy was renewed from July, 1911, to July, 1912, it was supposed that the business was running under the same ownership as before, and that Mr. Pierce was there as manager of the business. He further testified that when the accident occurred to Cripps, in October, the payment had not been made on the insurance policy, which had been issued in Cogan's name on the previous July, covering the employees, under the Workmen's Compensation Act. After the accident to Cripps, Pierce telephoned to Davidson, who

called at the office of the Cogan Transfer Company. Pierce then paid Davidson the overdue premium in cash, and asked him to "date back the bill for him previous to the time when the accident occurred, and make it out to G. D. Pierce, doing business as the Cogan Transfer Company." According to Mr. Davidson's books this premium was paid on the 23d of October, 1912. He sent a bill for this premium the first of every month, as was his usual custom, but the bill was not paid until the 23d of October following the accident. To October 23 all policies for insurance were sent addressed to David B. Cogan, 42 Howland Street. Between June, 1911, and the date of the accident, insurance policies had been taken out to cover the Cogan Transfer Company's business, including one on a horse. These policies were payable to David B. Cogan.

It further appears that the report of the accident, furnished the Industrial Accident Board under the Workmen's Compensation Act, was signed by G. D. Pierce as manager, and gave the employer's name as David B. Cogan. This report was dated Oct. 24, 1912.

The committee of arbitration finds as follows: that the release by John H. Cripps to the Boston Elevated railroad, in consideration of the payment of \$20, made on the afternoon of October 23, does not deprive the widow and dependent children of their rights under the Workmen's Compensation Act. In our opinion the right of dependents under this act, where death ultimately results from the injury, is a separate and independent right.

The committee of arbitration further finds that the payment of the money by the Elevated railroad to Bishop Anderson for the benefit of the widow and dependent children was a gift, and does not in any way constitute an election under Part III., section 15, Acts of 1912, and therefore does not deprive the dependent widow of the benefits she is entitled to under the Workmen's Compensation Act.

With reference to the claim that Pierce was the owner of the business in which Cripps was employed, and that therefore this insurance covering Cripps is not valid, and the Ætna Life Insurance Company is not bound to pay any claims to the dependent widow, because Cripps at the time was an employee

of Pierce, the committee of arbitration finds that the transfer from Cogan to Pierce was not made in good faith; that in fact there was no actual sale or transfer of the property or of the teaming and transfer business, and it was merely a colorable transaction for the sake of evading liability on the part of Cogan, for in reality the business was conducted by Cogan, and Pierce was an employee of his; that the arrangements made June, 1912, amounted merely to this: that Pierce was to assume control of the property; no documents were passed, and no money paid then or any other time. The testimony of both Cogan and Pierce shows that the insurance policy covering this business was in the name of Cogan; that when a mortgage and note were passed between Cogan and Pierce in August, 1912, this was because Cogan was in danger of a suit at law, and wished to protect the business from any attachments. The notice of the change in ownership from Cogan to Pierce filed in the city hall in August was for this same purpose. The employees of the Cogan Transfer Company supposed that they were working for Cogan. After the accident on October 23 Pierce sent for the insurance agent and paid his overdue Cogan premium, and asked him to date the bill back so that he would be protected. He subsequently sent in a report to the Industrial Accident Board, as required by law, giving the name of the owner as David B. Cogan, and signed his own name as G. D. Pierce, Manager, and it was not until after the accident to Cripps that he asked the insurance company to change the name on the policy to correspond with the alleged change of ownership.

The committee of arbitration therefore finds that there has been no change of ownership of the Cogan business; that at the time of the accident to Cripps, David B. Cogan was still the owner of the business, on Oct. 23, 1912, and is the person insured on the policy No. B 5877 of the Ætna Life Insurance Company, and, in consequence, the injured employee, John H. Cripps, is covered under the Workmen's Compensation Act.

Held, that John H. Cripps, employed by David B. Cogan, insured in the Ætna Life Insurance Company, died Feb. 12, 1913, as a result of an injury arising out of and in the course of his employment, while in the employ of said David B. Cogan,

and his dependent widow, Julia Cripps, is entitled to compensation based on one-half his average weekly earnings, \$13.50, or \$6.75 for three hundred weeks from Oct. 23, 1912.

EDW. F. MCSWEENEY.

DANIEL D. DONOVAN.

Dissenting Opinion.

I hereby dissent from the findings on page 4 of the report in that the release of Cripps to the Boston Elevated is not binding on Cripps and his dependents.

Cripps had the right to look either for compensation under the act or against the Boston Elevated for his injuries. By taking the money and signing a release he elected his remedy for injuries received and bound thereby himself and his dependents.

I also dissent from the finding that the transaction between Cogan and Pierce was not a *bona fide* one. On the evidence I find Pierce to be the owner of the business of the Cogan Transfer Company on the date of and prior to the accident, and was not individually insured.

I agree with the majority of the committee that the payment of other moneys by the Elevated does not in any way bind Mrs. Cripps or her children in these proceedings.

WILLIAM W. RISK.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, Pemberton Building, Boston, Mass., Tuesday, May 13, 1913, at 2 P.M., and affirms and adopts the findings of the committee of arbitration.

The Board finds that on Oct. 23, 1912, John H. Cripps received an injury while in the course of his employment, as a result of which he died on Feb. 12, 1913.

The Board further finds that at the time of the injury John H. Cripps was in the employ of David B. Cogan, who was covered under the Workmen's Compensation Act in a policy of

insurance in the *Ætna* Life Insurance Company, and that an alleged transfer of the business from the said Cogan to one Gilbert D. Pierce was not a *bona fide* transfer.

The Board further finds, at the request of the insurer, that at the time John H. Cripps, the deceased employee, signed the release to the Boston Elevated Railway Company he stated that he wanted \$25, as he thought that was a fair amount, whereas the adjuster offered only \$20, and after some discussion Mr. Cripps accepted that sum and signed the release. At the request of the insurer, a copy of said release is hereto attached.

The Board further finds that the signing of the release by the deceased employee does not operate to deprive the widow and dependent children of their rights under the Workmen's Compensation Act.

The Board further finds that the widow, Julia Cripps, was wholly dependent for support upon the said John H. Cripps at the time of his death, and is entitled to the payment of one-half the average weekly wages of the said John H. Cripps, amounting to \$13.50, that is, to the payment of \$6.75 a week for a period of three hundred weeks from Oct. 23, 1912, the date of the injury.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

Release and Settlement of Claim.

Know all Men by these Presents, That I, John H. Cripps of Boston in the County of Suffolk and Commonwealth of Massachusetts, being of full age, for the sole consideration of twenty dollars, to me paid by the Boston Elevated Railway Company, a corporation duly established by law, the receipt whereof is hereby acknowledged, do hereby release, acquit and discharge the said Boston Elevated Railway Company from all claims and demands, actions and causes of action, damages, costs, loss of service, expenses and compensation on account of, or in any way growing out of injuries resulting or to result from accident that occurred on or about the twenty-third day of October, 1912, at or near corner of Southampton and Reading streets by reason of a collision between one of the said company's cars and a team, I being the driver of the said team and do hereby for myself, my heirs, executors and administrators, covenant with

said Boston Elevated Railway Company to indemnify and save harmless the said Boston Elevated Railway Company from all claims and demands for damages, costs, loss of service, expenses or compensation on account of, or in any way growing out of said accident or its results.

Witness my hand and seal this twenty-third day of October in the year nineteen hundred and twelve.

I have read the above in presence of
 (Signed) JOHN H. CRIPPS. (Seal)
 (Signed) PERCY H. TITUS.

Approved for \$20.

(Signed) MAURICE SPILLANE,
Claims Attorney.

Approved for \$

(Signed) R. A. S.,
General Attorney.

Approved for \$20.

(Signed) J. H. NEAL,
General Auditor.

Decree of Supreme Judicial Court on Appeal.

BRALEY, J. The exceptions must be dismissed, as the insurer's appeal from the decree below is the only method by which questions of law arising under St. 1911, chapter 751, can be brought to this court. (McNichol's Case, 215 Mass. 497.) The deceased workman, while in the course of his employment and about his employer's business, driving a truck in the public streets, was struck by coming into collision with a car of a street railway company, receiving injuries which ultimately caused his death, although after the accident he performed his accustomed work for quite a period. The company having obtained on the afternoon of the day of the accident a release under seal from all liability, the insurer contends that the widow is not entitled to compensation under St. 1911, chapter 751, as amended by St. 1912, chapter 571. By section 15 the statute provides, that "where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages, or against the association for compensation under this act, but not against both, and if compensation be paid under this act the association may enforce in the name

of the employee, or in its own name and for its own benefit, the liability of such other person." The employee by his election to take damages, even if received without suit, and under the condition that the cause of action must be released, would exercise the option given by the statute. It would be too technical and refined a construction to treat the wording of the act as referring solely to an action for personal injuries, and if the employee had asked for compensation the settlement with the company if not set aside would have barred the claim. (Page v. Burtwell (1908), 2 K. B. 758; Powell v. Main Colliery Co. (1900), A. C. 366.) Prior to the present statute the right of the widow to damages for the death of her husband by wrongful act to be recovered for her own benefit in an action of tort by an administrator, and assessed within a minimum and maximum limit, according to the degree of culpability of the wrongdoer, or his servants or agents, had been conferred by our laws. (Brown v. Thayer, 212 Mass. 392, 397, 398, and statutes and cases there cited.) But the amount recovered has been held to be in substance a penalty, forming no part of the assets of his estate and liability for which the intestate could not release. (St. 1911, c. 635, § 1; Doyle v. Fitchburg Railroad, 162 Mass. 66, 71; Clare v. New York & New England Railroad, 172 Mass. 211; Smith v. Thompson-Houston Electric Co., 183 Mass. 371, 376; Jones v. Boston & Northern Railway, 205 Mass. 108, 109.) The St. of 1911, chapter 751, is not penal but is based on the theory of compensation. Primarily its object is to provide, in place of wages which he can no longer earn, the means of subsistence for the employee injured without "serious and willful misconduct" on his part, if he survives, or for the widow, and other dependents, if death ensues either with or without conscious suffering. The insurer under section 6, where death results, is to pay the dependents wholly relying upon the employee's earnings for support, compensation, and under section 7 a wife living with her husband at the time of death is conclusively presumed to be such dependent. The right of recovery expressly given to his widow cannot accrue until his death. Having been created for her benefit, it is independent of his control, and under section 22 can be discharged only by herself where she is the sole dependent, or by those authorized to act in her behalf. (Bowes v. Boston,

155 Mass. 344, 349; *Whitman v. Panama Railroad*, 23 N. Y. 465; *Michigan Central Railroad Co. v. Vreeland*, 227 U. S. 59; *Williams v. Vauxhall Colliery Co.* (1907), 2 K. B. 433, 436; *Howell v. Bradford Co.* (1911), 104 L. T. R. N. S. 433.) The provisions of section 13, requiring the amount awarded to be paid to his legal representatives, or if there are none then to his dependents, but if paid to the legal representative it shall be paid by him to the dependents, are administrative details relating to the distribution of the fund which cannot affect the right itself. The finding and ruling of the Industrial Accident Board — that the release did not extinguish the widow's claim — was in accordance with the statute. It is also urged that the Board erred in not deducting from the period computed the time during which the employee resumed work. The decision was right. The statute says that compensation shall accrue from the date of the injury. (St. 1911, c. 751, Part II., § 6.) The only exception is that where before death weekly payments have been made to the employee, the amount payable to dependents begins from the date of the last of such payments. We see no sufficient reason for enlarging the exception. A practical working rule easily applied has been provided, which should not be set aside even if in some cases its application may seem somewhat inequitable. If a change is deemed advisable it should come through legislative enactment.

Decree affirmed.

CASE No. 180.

WILLIAM HURLE, *Employee.*

PLYMOUTH CORDAGE COMPANY, *Employer.*

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, *Insurer.*

PERMANENT TOTAL INCAPACITY FOR WORK CAUSED BY TOTAL LOSS OF VISION. ATROPHY CAUSED BY NOXIOUS GASES, RESULTING IN OPTIC NEURITIS. THIS IS A PERSONAL INJURY UNDER THE WORKMEN'S COMPENSATION ACT. SUPREME JUDICIAL COURT AFFIRMS DECISION OF BOARD.

The employee, a foreman in the producer gas plant of the Plymouth Cordage Company, was required, in connection with his duties, to see that the furnaces which produced the gas were properly supplied with coal, burning evenly, at the right color, and to prevent incandescent spots caused by a forced draught.

It was in evidence that a man, in the performance of this task, was obliged every three minutes to keep the water-sealed cover of one of these holes open twenty seconds to look at the fire. The ordinary inside heat of the furnace was 15,000° F. The heat coming through these holes burns the hair and eyebrows. In addition to the heat and the resulting glare, certain noxious gases escaped when the holes were opened, such as carbon monoxide, carbon dioxide, carbon sulphite and other impurities contained in anthracite coal. There was some medical evidence of "tabes," but this was withdrawn by the insurer at the hearing before the committee of arbitration, the medical evidence of the two specialists called, one for the employer and the other for the employee, testifying that in their opinion the employee's blindness was caused by the poisonous gases and was not due to syphilis.

Held, that the employee received an injury arising out of and in the course of his employment, and that he is entitled to payment on account of total incapacity for work, in amount \$3,000, and to additional payments for loss of vision, in amount \$952.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to Supreme Judicial Court.

Decision. — The Supreme Judicial Court affirms the findings of the Industrial Accident Board.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of William Hurle v. American Mutual Liability Insurance Company, this being case No. 180 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Edward F. McSweeney, chairman, representing the Industrial Accident Board, Frederick A. P. Fisk of 10 Tremont Street, Boston, Mass., representing the employee, and John H. Harwood, Esq., of 703 Exchange Building, Boston, Mass., representing the insurer, heard the parties and their witnesses in the Hearing Room of the Industrial Accident Board, Pemberton Building, Boston, Mass., on Thursday, May 1, 1913, at 10 A.M., and a meeting of the arbitrators and lawyers in the case was held on Saturday, May 24, 1913, at 10 A.M.

William Hurle, age forty-seven, was employed by the Plymouth Cordage Company at its factory at Plymouth, Mass. (this company being insured under the Workmen's Compensation Act by the American Mutual Liability Insurance Company). During the last five years Hurle worked in the producer gas plant of this company, since October, 1910, being

foreman of this department. During the last twelve months of Hurle's service his average weekly wage was \$19.04. In the gas producer house are furnaces to make gas to run explosive engines. These furnaces produce gas by the burning of pea coal from a forced draught, each of the furnaces (there being 5) being cylindrical structures, 11 feet in diameter, 14 feet high, sealed with water. The coal which makes the gas is introduced through hoppers, arranged to prevent the escape of gas and the introduction of air. This gas is forced out of the furnaces and thence conducted by a pipe to an engine or engines into a retort in another building by its own pressure and the pressure of the forced draught through various purifying processes. On top of these cylinders in which the gas is made are 10 holes varying from $2\frac{1}{2}$ to $3\frac{1}{2}$ inches in diameter, through which the operator watches the fire by opening a cover sealed by water and looking into the fire. In performance of his duties as foreman, Hurle was employed continuously to see that those furnaces were properly supplied with coal, burning evenly, at the right color, and to prevent incandescent spots caused by burning of the fire by forced draught. He was provided with a poker 17 feet long, which, when necessary, he inserted through one of the holes in the top of the cylinder and with it covered up any part of the coal that was burned through or too bright. Mr. Skakle, chief engineer of the Plymouth Cordage Company, testified that a man doing his duty was obliged, every three minutes, to keep the water-sealed cover of one of these holes open twenty seconds to look at the fire. When found needful, the workman opens a pokerhole to take care of the furnace fire, and must look to see the particular part of the fire to put the poker in. This takes about ten to twenty seconds. A workman's field of vision covers one-third of the furnace by looking through any one hole. When necessary, workmen open the hole and use the poker, correcting the fire, taking, probably, one minute to do this, on an average. The ordinary inside heat of the furnace was $15,000^{\circ}$ F., described by Mr. Skakle as between cherry red and a hot poker in color. Employees wear gloves, because otherwise their hands would burn, and occasionally, when poking the fire, the heat coming up from these holes burns the employees' hair and eye-

brows. Sometimes when employees are bending down to look at the fire through these holes, their heads come within a foot and a half to two feet from the top of the furnace, and at such a time it is possible the hair and eyebrows may be singed. During the course of the employee's labor he would have to pass his head over one of these holes, in the ordinary course of events, from six to seven times an hour, or sixty to seventy times a day.

Regarding the light, when the holes become incandescent, that is, when air was admitted, the light from each of the holes was described as being equal to the glare of an incandescent lamp at 110 candle power, and these holes in the furnace became incandescent and gave forth a light equal to 110 candle power from about five to seven times an hour, or from fifty to seventy times a day. In other words, seventy times a day the workman passed his head over these holes and felt the effect of the heat, and about the same number of times daily one of the holes over which the workman passed his head became incandescent and the glare was felt by him. In addition, when these holes were opened they gave forth certain by-products of coal being made into gas, such as carbon monoxide, carbon dioxide, carbon sulphite and other impurities contained in anthracite coal.

It appears from the testimony that sometime during the latter part of July or in the early part of August, probably in July, Hurle began to notice that his eyesight was failing noticeably, and on Aug. 10, 1912, he consulted Dr. J. Holbrook Shaw, an oculist and aurist, with offices at Plymouth and Boston. After an examination of his eyes Dr. Shaw found that in Hurle's left eye he had only about one-fiftieth of normal vision, which was not improved by glasses, and in the right eye he found that he had, without glasses, about one-half of normal vision. With a convex, spherical lens glass he got two-thirds of his normal vision. Dr. Shaw found Hurle's personal history negative. At the time of his visit Hurle told him he had got a cinder in his left eye sometime previously, and had used a good deal of tobacco. Dr. Shaw examined and found the field of vision contracted, with a central defect in the left eye and both the nerves very pale. He examined Hurle's color sense roughly,

without using a perimeter, with a piece of cotton on a pencil, the result of his observation being that the condition of his eye at that time negatived the idea that the condition was caused by the use of tobacco. After this examination Hurle's sight failed progressively. He continued at his employment from August 10, when he first consulted Dr. Shaw, until October 21, when he worked for the last time, being taken off the pay roll of the Plymouth Cordage Company on Oct. 26, 1912. Towards the end of Hurle's employment his sight failed so rapidly that his boy came with a lantern to help him home after work. Mr. Skakle, chief engineer in charge, stated that as far as he knew Hurle had been able to perform his work up to October. It appeared in the testimony that Hurle had bought a pair of reading glasses in February, 1911, from Mr. Charles Everson of Plymouth, but these glasses were acknowledged to be necessary only because of the shortening of near vision, caused by the physiological changes in Hurle's eyes due to his age. Hurle and some of his fellow workmen in the gas producer house testified that during the course of their employment they frequently had headaches which centered in the forehead, immediately over the eyes, and were occasionally nauseated. Frequently, when poking the furnaces, the glare would cause them to be blinded temporarily, so that they would be obliged to shut their eyes, and on opening them would find their vision obscured by black spots, but this effect would pass away in a short while.

Dr. W. F. O'Reilly, an eye specialist, testifying for the injured employee, said he examined Hurle on March 5, 1913, and found him blind in both eyes, the condition of the eyes being due to structural changes, the principal one being the atrophy of the optic nerve, the nerve being dead. At this time Hurle could not see and was only able to perceive light in the right eye. In answer to a hypothetical question which gave the agreed facts as to Hurle's history, the length of time he had worked in this producer gas building, the character of the work, considering the glare, the heat, and the fumes from the holes in the furnace, Dr. O'Reilly gave as his opinion that Hurle's blindness was due to poisoning by the gases and other impurities that go with the gases, the heat and light contributing by

causing irritation of the delicate parts of the nerves. He further stated that carbon monoxide, carbon dioxide, ammonia, sulphur, free nitrogen and other compounds, when introduced into the system, have a peculiar affinity for the optic nerve, and may produce acute neurosis and result in atrophy. In this case, these gases entering the system had brought about the poisoning of this nerve, resulting in blindness. Dr. O'Reilly also gave it as his opinion that Hurle's blindness is not in any way due to any traumatic injury, — that is to say, to any blow, such as a cinder on the outside of the eye, — his blindness being wholly due to some cause operating on the nervous system within the body.

Dr. John Morgan, 39 Huntington Avenue, Boston, an eminent eye specialist, was called by the insurer. He examined Hurle in November, and on the day before this hearing, April 30. He agreed that the cause of Hurle's blindness was atrophy of the optic nerve. Among the causes of this atrophy, he would consider the nature of Hurle's work. In his opinion, the inhalation of gases would cause the atrophy by influence upon the condition of the blood, causing blood changes. While such an atrophy might be gradual, in this case, considering the fact that Hurle had worked in the gas house for five years, and had never noticed any trouble with his eyesight until August, 1912, and during the next sixty days became practically blind, it would naturally follow as a reasonable conclusion that there was an acute inflammation of the optic nerve, followed by atrophy. It was possible, in Dr. Morgan's opinion, that Hurle might have overlooked a gradual failure of his sight, which might not have failed sufficiently to attract his attention until August; but allowing that Hurle's eyesight was imperfect or unequal in August, to have practically lost his sight in sixty days there must have been some acute attack to account for it. In Dr. Morgan's opinion there are many cases of optic neurosis or atrophy of the optic nerve in which the cause is unknown. He did not believe that Hurle had a tumor of the brain, which was a cause of optic atrophy. Dr. Morgan believed that when Hurle got an especially strong whiff of the gas, it exercised a bad influence and would cause the pains in his head. The fact that Hurle was fitted for glasses a year before would not indi-

cate anything serious the matter with his eyes other than could be accounted for by his age. When Hurle came to Dr. Morgan for examination, November 26, he was totally blind in his left eye; could see fingers at 6 feet with the right eye, and was totally blind the last of April. Given that progressive blindness in this period, if eyesight was perfect until August and failed as rapidly as he alleged, it was due to an acute attack of optic neuritis, or acute inflammation of the optic nerve. The cause of the atrophy in this case, in Dr. Morgan's opinion, comes down to two causes, either the poisoning of the gases or the poisoning of tobacco or the two together.

Edward C. Stone, Esq., attorney for the insurer, submitted a request for rulings on the law, attached hereto. The arbitrators give Mr. Stone Nos. 1 to 8, inclusive, and Nos. 21 to 26, inclusive, and refuse Nos. 9 to 20, inclusive, reserving to the insurer its rights.

Subsequent to the hearing on May 24, information was received by the arbitrators that Hurle had been examined at the Eye and Ear Infirmary and that a diagnosis had been made of "tabes," and he had been referred to the Massachusetts General Hospital, where this diagnosis was confirmed. Several Wassermann tests showed a positive reaction, and salvarsan, or "606" was administered.

The arbitrators had before them, up to the close of the hearing on May 24, evidence only as to two possible causes for this blindness: first, the use of tobacco; second, the poisons from the furnaces over which Hurle worked. The information as to the examination at the Massachusetts General Hospital indicated a third cause, *i.e.*, a tabetic condition which is a common cause of optic atrophy. Both parties were notified, and the arbitrators granted another hearing to consider this new development, which hearing was held at the rooms of the Industrial Accident Board, July 3, 1913. Dr. O'Reilly, called as an expert for the injured workman, testified that in his opinion the Wassermann reaction had not, in any way, changed his judgment as to the cause of this blindness being due to the effect of the poisonous gases in Hurle's employment. Dr. O'Reilly testified that the Wassermann reaction was a test not alone for syphilis, but also, under given conditions, for scarlet fever,

tuberculosis, lead poisoning and a number of other diseases which he named.

Dr. John Morgan, the eye specialist, called as an expert by the insurance company, testified that in his opinion, in this case, the arbitrators should disregard the Wassermann test, and that his opinion had not changed regarding the cause of blindness being due to poisonous gases in the course of Hurle's employment.

At this point the American Mutual Liability Insurance Company announced itself as willing to disregard all developments happening after the hearing on May 24, and desired the case settled on the testimony as offered up to and including the hearing on May 24, 1913.

The arbitrators find that William Hurle, an employee of the Plymouth Cordage Company, insured under the Workmen's Compensation Act in the American Mutual Liability Insurance Company, was, after July 1, and until Oct. 21, 1912, employed in the manufacture of producer gas, and as a result of this employment his eyes were exposed to excessive heat and a glare irritating to the eyes. In addition he was exposed to the fumes of the gases from these furnaces, which gases contained certain chemical compounds which, when introduced into the human system, either through the respiratory or the digestive tract, might produce atrophy of the optic nerve and consequent blindness.

The arbitrators find, as a matter of fact, that there was no traumatic injury or blow to the exterior of the eye which would have brought about this atrophy.

The arbitrators find, after considering the testimony as to the possible effect of tobacco, that Hurle had been using tobacco for more than thirty years; and while tobacco might produce atrophy, there is no likelihood that it had this result in this case, Dr. Shaw's examination of Hurle on Aug. 10, 1912, excluding it as a factor in consideration.

The arbitrators find that while there are many causes, known and unknown, that produce atrophy of the optic nerve, none of these causes, except that of tobacco and gases, are shown in evidence to have operated in Hurle's case, and the fact that he has been exposed constantly in his employment to poisonous

gases, which are an accepted cause of atrophy, is sufficient to show, by the preponderance of testimony, that Hurle's blindness was brought about by the entrance into Hurle's body of noxious gases — by-products of coal gas — while at his regular employment for the Plymouth Cordage Company.

The arbitrators find that Hurle's blindness is due to the inhalation of noxious gases, resulting in optic neuritis or acute inflammation of the optic nerve, and is an injury arising out of and in the course of his employment.

Regarding the exact date of the beginning of this atrophy, the fact that on August 10 Hurle had only one-fiftieth of vision in his left eye and two-thirds of normal vision, with glasses, in his right eye, and was practically blind and incapacitated for labor in both eyes, within sixty days thereafter, indicates, as testified to by Dr. Morgan, that the disease from which Hurle suffered was an acute process which, once begun, went rapidly forward to its conclusion of total blindness. The arbitrators find that the overwhelming preponderance of the testimony indicates, and they find as a fact, that the disease in either eye did not antedate July 1, 1912.

The arbitrators find that due to and arising out of his employment, William Hurle received an injury which resulted in blindness and incapacity for labor, and is therefore entitled, under section 9 of Part II. of the Workmen's Compensation Act, to total disability for a period of three hundred and fifteen weeks and seven-eighths of one day, from Oct. 26, 1912, at one-half his average weekly wages, \$9.52, or a total of \$3,000.

The arbitrators further find, in addition, that, according to section 11, Part II., for the reduction to one-tenth of normal vision in both eyes, with glasses, Hurle is entitled to additional compensation of one-half his average weekly wages for a period of one hundred weeks from Oct. 26, 1912, at \$9.52 per week, or \$952.

EDW. F. MCSWEENEY.

FREDERICK A. P. FISKE.

JOHN H. HARWOOD.

Insurer's Requests for Rulings.

1. It is incumbent upon the employee to prove by a fair preponderance of the evidence that he received a personal injury beginning on or about the first day of August, 1912, and continuously thereafter until Oct. 23, 1912, arising out of and in the course of his employment.

2. The employee has the burden of proving by a fair preponderance of the evidence that he received a personal injury beginning on or about the first day of August, 1912, and continuously thereafter until Oct. 23, 1912, arising out of and in the course of his employment.

3. It is incumbent upon the employee to prove by a fair preponderance of the evidence that he received a personal injury on or after July 1, 1912, arising out of and in the course of his employment.

4. The employee has the burden of proving by a fair preponderance of the evidence that he received a personal injury on or after July 1, 1912, arising out of and in the course of his employment.

5. If, upon the evidence, the employee might have received the personal injury from which he alleges he is now suffering prior to July 1, 1912, the employee is bound to exclude by a fair preponderance of the evidence the receiving of such personal injury prior to July 1, 1912.

6. If, upon all the evidence, it is as likely that the employee received before July 1, 1912, the personal injury of which he now complains, as that he received it after July 1, 1912, the employee is not entitled to compensation.

7. If other causes than those arising out of and in the course of the employee's employment might have produced the personal injury claimed in this case, the plaintiff is bound to exclude the operation of such causes by a fair preponderance of the evidence.

8. If, upon all the evidence, it is as likely that the personal injury claimed to have been received by the employee was due to causes not arising out of and in the course of his employment, as that it was due to causes arising out of and in the

course of his employment, the employee is not entitled to compensation.

9. There is no evidence that the employee received a personal injury within the meaning of the Workmen's Compensation Act.

10. There is no evidence that the employee received a personal injury within the meaning of the Workmen's Compensation Act after July 1, 1912.

11. There is no evidence that the employee received a personal injury within the meaning of the Workmen's Compensation Act arising out of or in the course of his employment on or after July 1, 1912.

12. Upon all the evidence, the employee is not entitled to compensation under the Workmen's Compensation Act.

13. Upon all the evidence, the employee did not receive a personal injury within the meaning of the Workmen's Compensation Act.

14. Upon all the evidence, the employee did not receive a personal injury within the meaning of the Workmen's Compensation Act on or after July 1, 1912.

15. Upon all the evidence, the employee did not receive a personal injury arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act.

16. Upon all the evidence, the employee did not receive a personal injury arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act on or after July 1, 1912.

17. A disease, even though arising out of and in the course of his employment, is not a personal injury within the meaning of the Workmen's Compensation Act.

18. If the employee was suffering from a disease prior to July 1, 1912, even though it be one arising out of and in the course of his employment, and as a result of continuing in his employment that disease is aggravated, the employee has not received a personal injury within the meaning of the Workmen's Compensation Act.

19. If the employee was suffering from a disease prior to July 1, 1912, even though it be one arising out of and in the

course of his employment, and as a result of continuing in the employment that disease is aggravated, the employee is not entitled to be paid compensation under the Workmen's Compensation Act.

20. If the employee was suffering from atrophy of the optic nerve prior to July 1, 1912, even though that atrophy arose out of and in the course of his employment, and as a result of continuing in the employment that atrophy is aggravated, the employee is not entitled to be paid compensation under the Workmen's Compensation Act.

21. The burden is upon the employee to show affirmatively that any personal injury received by him arose out of and in the course of his employment.

22. If it can be affirmed only upon mere conjecture that the employee has received a personal injury arising out of and in the course of his employment, he is not entitled to compensation.

23. If the employee might have received the personal injury claimed in this case from unknown causes, the employee was bound to exclude the operation of all unknown causes by a fair preponderance of the evidence.

24. Upon all the evidence, the only personal injury, if it be such, within the meaning of the Workmen's Compensation Act, received by the employee, was an atrophy of the optic nerve.

25. Upon all the evidence, the employee received no traumatic injury.

26. The only evidence, if any, that any personal injury was received by the employee arising out of and in the course of his employment is the evidence that the atrophy of the optic nerve was caused by the glare of the light and the inhalation of the gases manufactured by the employer in the apparatus tended by the employee.

By its Attorneys,

SAWYER, HARDY & STONE.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, Pemberton Building, Boston, Mass., on Thursday, Sept. 18, 1913, at

10 A.M., and Thursday, Sept. 25, 1913, at 9.30 A.M., and affirms and adopts the findings of the committee of arbitration.

Subsequent to the hearings of the arbitrators in this case, information was received by the arbitrators that there was evidence existing that the blindness by which Hurle was incapacitated from labor was due not to his employment, but to a tabetic condition resulting from a syphilitic infection. A meeting of the arbitrators was called to consider this matter, and after certain testimony had been produced by the insurer, on the initiative of the insurer it was mutually agreed by both parties to the case that the arbitrators should disregard any testimony in regard to syphilis as being the cause of the blindness from which Hurle suffered. It was further agreed that, in case that evidence to substantiate the claim of syphilis should not be given, the findings of the arbitrators that the cause of the blindness was due to the poisons of coal tar gas would be accepted, and appeal from the decision, if taken, would be only from the fact that blindness resulting from the inhalations of poisonous gases in Hurle's occupation was not a personal injury within the meaning of the law. A finding was subsequently made by the arbitrators that Hurle's blindness was due to the poisons of coal tar gas inhaled by Hurle during his employment subsequent to July 1, 1912.

In its appeal to the Industrial Accident Board for review of this case, the insurer asked permission to submit new testimony that Hurle's blindness was due to syphilis.

The Industrial Accident Board granted the request of the insurer, and reopened the case on the facts that evidence might be submitted that syphilis and not coal tar gas was the cause of Hurle's blindness. The attorney for the employee objected.

Various doctors from the Massachusetts Eye and Ear Dispensary and the nerve department of the Massachusetts General Hospital, with specialists called by the injured employee, gave testimony to the effect that, on Oct. 26, 1912, Hurle presented himself at the out-patient department of the Massachusetts General Hospital for examination. It appearing to the examining doctor at the out-patient department that Hurle's blindness was due to tabes, he was referred to the Massachusetts General nerve department, and there put through

certain examinations and tests, all based on the idea that he previously had had syphilis, and that the condition they were dealing with was tabes, resulting therefrom. The physicians called by the insurer testified that Hurle had what was called the Argyle-Robertson pupil, a condition in which the pupil of the eye responds to light but not distance. It was found that there was absence of the biceps, patella and Achilles reflexes, all of which were characteristic of tabes. On the assumption that Hurle's disease was tabes following syphilis, apparently verified by these various tests, another test called the Wassermann test and a test called the Nougchi test were taken, the results of which further confirmed the doctors of the nerve department of the Massachusetts General Hospital in their belief that they were dealing with a case of optic atrophy, which is one of the manifestations of tabes, and which was due to syphilis; and in consequence they testified this was the direct cause of Hurle's blindness. In the record of the Massachusetts General Hospital, produced at the hearing, the examining doctor wrote that Hurle, in answer to a direct question, replied that he "might have had lues," which is one of the medical terms describing the objective result of syphilitic infection. Hurle testified in rebuttal that while he might have made this answer, he did not understand what "lues" meant, and as a matter of fact never had syphilis.

It was agreed that an examination of Hurle's family by an insurance doctor since he became blind showed that Hurle had five children living at home, the oldest being eleven years; that his wife has had no miscarriages, no children having died in infancy, and the youngest child now living being nine months old; that in none of these children is found the stigmata of syphilis expected by experts to be found in children having a syphilitic parent.

Dr. John Morgan of Huntington Avenue, Boston, an eminent eye specialist, who originally appeared at the request of the insurer as its expert, who had examined Hurle in December, 1912, before he became quite blind, testified that while he agreed that Hurle's physical condition, the absence of reflexes, etc., were as described by the doctors of the Massachusetts

General Hospital, it did not follow that this was proof that the man had tabes following syphilis. In his opinion the Wassermann test was in this case not a conclusive test, and not to be relied on as to syphilis, for the reason that a positive Wassermann reaction was shown for other diseases than syphilis, such as lead poisoning, advanced tuberculosis, scarlet fever, tropical diseases, etc. Dr. Morgan gave it as his opinion that the degenerative process which had taken place in Hurle's dorsal nerve can be and should be in Hurle's case attributed to the carbon monoxide, carbon dioxide and other poisons in the coal tar gas which he inhaled during his employment; and in his opinion Hurle's inhalation of the poisons from these gases was wholly responsible for his blindness.

After consideration, the Board finds that the evidence shows that all the symptoms which the insurer's doctors ascribe to syphilis can also result from carbon monoxide, carbon dioxide or other poisons emanating from coal tar gas.

Drs. McConnell and Spiller, in "A Clinicopathologic Study of Carbon Monoxide Poisoning," in the Journal of the American Medical Association of Dec. 14, 1912, give almost the exact symptoms described by Hurle in his examination before the arbitration committee, as "nausea and indefinite feeling of illness, with lightness of the head, headache, vertigo, great muscular weakness." "Loss of control of the sphincters," which is given as one of the proofs of tabes by the experts for the insurer, is given by McConnell and Spiller as one of the sequelæ of carbon monoxide poisoning.

The occurrence of relapsing carbon monoxide poisoning is explained by Becker and Schwerin on the basis of a "deep-seated disturbance of the regeneration of all organs, especially of the vascular walls and the ganglion cells of the nervous system, as is evidenced by the secondary hemorrhages, idiocy, imbecility, etc., which are observed as sequelæ."

The poisonous action of carbon monoxide is without doubt due to the fact that it is readily absorbed by the blood entering into a definite chemical compound with hæmoglobin. This combination is more stable than a similar compound with oxygen gas, and is therefore slow in elimination. — ("Poisons, their Effects and Protection," A. Wynter Blyth, "Mass Poisoning by Carbon Monoxide.")

The Industrial Accident Board has defined "personal injury," as used in the Workmen's Compensation Act, to be any injury, or damage, or harm, or disease which arises out of and in the course of the employment which causes incapacity for work, and takes from the employee his ability to earn wages, the act providing for the payment of compensation "while the incapacity for work resulting from the injury is total," based upon half the average weekly wages of the employee, and "while the incapacity for work resulting from the injury is partial," based upon "one-half the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter," thus making it clear that the law was intended to provide for the payment of compensation for a "personal injury" which causes incapacity for work.

The weight of the evidence in this case does not show that Hurle ever had syphilis, or that there ever was any other influence other than the personal injury resulting from the poisons of coal tar, which was sufficient to bring about the conditions from which the employee now suffers.

The Board finds that, in view of the fact that Hurle, the said employee, showed no evidence of loss of vision until about Aug. 10, 1912, and that he became practically blind on Oct. 26, 1912, the loss of vision in both eyes was due to a personal injury, the result of the introduction into the said employee's body of an acute poison subsequent to July 1, 1912, the latter being the date upon which the Workmen's Compensation Act became effective.

The Board finds that the vision of the employee has been reduced to less than the "one-tenth of normal vision in both eyes with glasses," required by section 11 (a), Part II., of the act to make effective the provision requiring the insurer to pay the additional compensation specified therein; that is, the payment of a weekly compensation of half the average weekly wage for a period of one hundred weeks, the said employee being, in fact, totally blind, having no vision in either eye.

The Board finds that the said employee is totally incapacitated for work as a result of a personal injury which arose out of and in the course of his employment, said personal injury

causing total loss of vision in both eyes, and resulting from an attack of acute optic neuritis, said acute optic neuritis being caused by the gradual accumulation of the poisonous emanations from coal tar gases; that said personal injury incapacitated him on Oct. 26, 1912; and that, in so far as the Workmen's Compensation Act is concerned, there is no difference between the incapacity for work caused by blindness resulting from the effect of the gradual accumulation of the poisonous emanations of coal tar gas inhaled into the human system and that resulting from a blow which causes equal loss of vision and incapacity for work, provided the personal injury received arises out of and in the course of the employment, as shown in this case. The Board finds that there is due the employee, the said William Hurle, a weekly payment of \$9.52 on account of the total incapacity for work resulting from the said personal injury, payments to date from Nov. 9, 1912, this being the fifteenth day after the injury, and to continue during said total incapacity for work in accordance with the provisions of the act, not to exceed a period of three hundred fifteen weeks and seven-eighths of one day, nor to exceed the sum of \$3,000; and a further payment of \$952 in weekly payments of \$9.52 on account of the total loss of vision in both eyes, said payments to date from Oct. 26, 1912, and to continue for a period of one hundred weeks.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

Decree of Supreme Judicial Court on Appeal.

RUGG, C.J. This is a case under the Workmen's Compensation Act. The facts as found by the Industrial Accident Board are that the employee is totally incapacitated for work by personal injury which arose out of and in the course of his employment, and which caused total loss of vision in both eyes, and which resulted from an acute attack of optic neuritis induced by poisonous coal tar gases. His work was about furnaces for producing gas by the burning of coal, in the top of

which were several holes through which after opening a cover he could watch the fire. It was his duty to see that the furnaces were supplied with coal and burning evenly, and to prevent incandescent spots caused by the burning by forced draught. It was necessary for him to open one or another of these holes about 70 times a day, and whenever these holes were opened, poisonous gases were given forth. The inhalation of these caused his blindness.

The question to be decided is whether this was a "personal injury arising out of and in the course of his employment" within the meaning of those words in St. 1911, chapter 751, Part II., section 1. Unquestionably it arose out of and in the course of his employment. The only point of difficulty is whether it is a "personal injury."

The words "personal injury" have been given in many connections a comprehensive definition. They are broad enough to include the husband's right to recover for damage sustained by bodily harm to his wife, the alienation of a husband's affections, the seduction of one's daughter and other kindred tortious acts. (Mulvoy v. Boston, 197 Mass. 178, and cases there cited; Riddle v. MacFadden, 201 N. Y. 215; N. Y., Philadelphia and Norfolk R.R. v. Waldron, 116 Md. 441; Johnson Fertilizer Co. v. Rich, 180 Ala. (62 So. 40); McDonald v. Brown, 23 R. I. 546; Tomlin v. Hildreth, 65 N. J. L. 440, 445; Sharkey v. Skilton, 83 Conn. 503, 510.) They are not confined to the instances where the wrong can be described technically as trespass to the person *vi et armis*. The statement in Commonwealth v. Mosby, 163 Mass. 291, 29, that a "threat to injure the person of another naturally means a threat to use actual physical force," is not at variance with this idea. There were special reasons why the word "injury" was given a constricted meaning in 28 Opinions of the Attorneys-General of the U. S., 254. It has been interpreted broadly in policies of accident insurance. (Freeman v. Mercantile Mutual Accident Association, 156 Mass. 351.)

At common law the incurring of a disease or harm to health is such a personal wrong as to warrant a recovery if the other elements of liability for tort are present. (Hunt v. Lowell Gas Light Co., 8 Allen, 169; Allen v. Boston, 159 Mass. 324;

Larson v. Boston Elevated Ry., 212 Mass. 267; *Diesenvieter v. Kraus-Markel Malting Company*, 92 Wis. 164; *Wagner v. H. W. Jayne Chemical Co.*, 147 Pa. St. 475; see also *Gossett v. So. Rwy. Co.*, 115 Tenn. 376.) Damages of this sort have been held not recoverable under the mill acts, although an independent action would lie if a nuisance were created. (*Eames v. N. E. Worsted Co.*, 11 Met. 590; *Fuller v. Chicopee Mfg. Co.*, 16 Gray 46; see also *Wellington v. Boston & Maine Rd.*, 158 Mass. 185, 189.) The preponderance in recent years of actions grounded upon some physical violence has tended to emphasize the aspect of injury which depends upon visual contact or direct lesion. But that is by no means the exclusive signification of the word either in common speech or in legal use.

The English Workmen's Compensation Act affords compensation only where the workman receives "personal injury by accident." It adds to the personal injury alone required by our act the element of accident. Yet it has been held frequently that disease induced by accidental means was ground for recovery; as, for example, a rupture resulting from over-exertion (*Fenton v. Thorby & Co., Ltd.*, 1903, A. C. 443); infection of anthrax from a bacillus from wool which was being sorted (*Brintons, Ltd., v. Turney*, 1905, A. C. 230); heat from a furnace (*Ismay Imrie & Co. v. Williamson*, 1908, A. C. 437); sunstroke (*Morgan v. S. S. Zenaida*, 25 L. T. R. 446; S. C., 2 B. W. C. C. 19); pneumonia, induced by inhalation of gas (*Kelly v. Auchenlea Coal Co., Ltd.*, 1911; S. C., 864; S. C., 4 B. W. C. C. 417, and *Alloa Coal Co., Ltd., v. Drylie*, 6 B. W. C. C. 398; S. C., 50 S. L. R. 350). (See also *Brown v. George Kent, Ltd.*, 1913, 3 K. B. 624.) We lay these cases on one side, however, because it is plain from the Third Schedule of 6 Edward 7, c. 58, that certain occupational diseases were intended to be included within the English act.

Hood & Sons v. Maryland Casualty Company, 206 Mass. 223, goes far toward deciding the case at bar. That was an action by an employer of labor against an insurer who had contracted to indemnify against damages sustained by the employer by reason of liability to its employees "for bodily injury accidentally suffered" by them in their employment. The

employer had been obliged to respond in damages to one Barry, an employee, who had become infected by glanders while cleaning a stable. It was said in the opinion, at page 225, "It is plain that Barry suffered bodily injury in consequence of becoming infected with glanders; as much so as if he had had a leg or an arm broken by a kick from a vicious horse. Indeed, it is possible that the bodily injury caused by glanders was greater and more lasting than that caused by a broken leg or arm would have been." That case related to the kind of bodily injuries which arise from the relation of master and servant. It was decided about one year before the enactment of our Workmen's Compensation Act. It relates to the same general subject-matter. The law of accident insurance has been applied to injuries under the Workmen's Compensation Act in England. (*Wicks v. Dowell*, 1905, 2 K. B. 225.)

There is nothing in the act which leads to the conclusion that "personal injuries" was there used in a narrow or restricted sense. The provisions as to notice of injury, Part II., sections 15 to 18 both inclusive, as amended by St. 1912, chapters 172 and 571, section 3, indicate a purpose that information shall be given as to the time, place and cause of the injury as soon as practicable after it is suffered. But this requirement can be complied with in the case of an injury caused by the inhalation of a poisonous gas producing such results as here are disclosed, as well as in the case of a blow upon the body. An argument may be drawn from the provisions of Part III., section 18, as amended by St. 1913, chapter 746, section 1, in favor of a liberal interpretation of "personal injuries." By the section as originally enacted the duty was imposed upon every employer to keep a record of all injuries, but he was required to make a return to the Industrial Accident Board only of "an accident resulting in a personal injury." By the amendment, which of course has no effect upon the legal rights of the parties in the present action, but which may be resorted to for discovery of legislative intention, the employer is required to make return of "the occurrence of an injury" and to state "the day and hour of any accident causing the injury." If these words are accurately used, a distinction is drawn between the injury and the accident caus-

ing the injury. The authority conferred upon the Board and the Directors of the Massachusetts Employees Insurance Association by Part IV., section 18, is to "make and enforce reasonable rules and regulations for the prevention of injuries" and not for the prevention of accidents. (See also St. 1913, c. 813.) The name "Industrial Accident Board," which is the administrative body created by Part III., is a mere title and cannot be fairly treated as restrictive of its duties.

The difference between the English and Massachusetts acts in the omission of the words "by accident" from our act, which occur in the English act as characterizing personal injuries, is significant that the element of accident was not intended to be imported into our act. The noxious vapors which caused the bodily harm in this case were the direct production of the employer. The nature of the workman's labor was such that they were bound to be thrust in his face. The resulting injury is direct. If the gas had exploded within the furnace and thrown pieces of cherry-hot coal through the holes into the workman's eyes, without question he would have been entitled to compensation. Indeed, there probably would have been common-law liability in such case. (*Sullivan v. Barker Asphalt Co.*, 201 Mass. 227.) There appears to be no sound distinction in principle between such case and gas escaping through the holes and striking him in the face, whereby through inhalation the vision is destroyed. The learned counsel for the insurer in his brief has made an exhaustive and ingenious analysis of the entire act touching the words "injury" or "injuries," and has sought to demonstrate that it cannot apply to an injury such as that sustained in the case at bar. But the argument is not convincing. It might be decisive if accident had been a statutory word. It is true that in interpreting a statute words should be construed in their ordinary sense. Injury, however, is usually employed as an inclusive word. The fact remains that the word "injury" and not "accident" was employed by the Legislature throughout this act. It would not be accurate but lax to treat the act as if it referred merely to accidents. (*Warner v. Couchman*, 1912, A. C. 35, at p. 38.)

Decree affirmed.

CASE No. 208.

JOSEPH C. GAYNOR, *Employee.*

T. D. COOK & Co., INC., *Employer.*

STANDARD ACCIDENT INSURANCE COMPANY, *Insurer.*

CASUAL EMPLOYMENT CLAIMED. EMPLOYEE, WHOSE REGULAR OCCUPATION WAS THAT OF A WAITER, FATALLY INJURED WHILE SERVING BANQUET FOR CATERER WHO EMPLOYS NO REGULAR WAITERS. SUPREME JUDICIAL COURT DECIDES THAT WIDOW IS NOT ENTITLED TO COMPENSATION.

The employers, a catering firm, had a contract to serve a certain banquet and, not having a regular corps of waiters, engaged the employee, whose regular occupation was that of a waiter, and others to assist in serving it. It appeared that the employee was fatally injured while engaged in the usual course of the business of his employers, the serving of banquets being an important part of said business, and it being the custom for the said employers to engage men whose regular occupation was that of waiters to serve such banquets.

Held, that this was not casual employment, as claimed, and that the widow was entitled to compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to Supreme Judicial Court.

Decision. — The Supreme Judicial Court reverses the findings of the Industrial Accident Board.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Joseph C. Gaynor v. Standard Accident Insurance Company, this being case No. 208 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Dudley M. Holman of the Industrial Accident Board, chairman, Thomas A. Prior, for the employee, and Thurston L. Smith, representing the insurer, being duly sworn, heard the parties and their witnesses at the Hearing Room of the Industrial Accident Board on Thursday, May 8, 1913, at 10 A.M.

Counsel for plaintiff and defendant both agreed to the following facts: —

First. — That plaintiff's intestate's average weekly wage for one year preceding the date of his accident was \$15 a week.

Second. — That his widow, Emma G. Gaynor, is the duly appointed administratrix of his estate, and she was living with her husband at the time of his death according to section 7, Part II., of chapter 751, Acts of 1911, as amended by chapters 172 and 571, Acts of 1912. She is conclusively presumed to be wholly dependent for support upon the wages of her husband, Joseph C. Gaynor, and she was so dependent and therefore is entitled to be paid compensation at the rate of \$7.50 a week for a period of three hundred weeks from the date of the injury, provided that her husband was not a casual employee as defined in Part V., section 2, of the Workmen's Compensation Act.

Third. — That the accident happened at South Hadley, Mass., but that both sides waived the provision of section 7, Part III. of the act, and requested in writing of the Industrial Accident Board that this hearing should take place at Boston.

Fourth. — That the sole question before this arbitration committee was whether or not upon all the evidence the plaintiff's intestate was an employee within the meaning of the definition of this work as set out in Part V., section 2.

We find that Joseph C. Gaynor was a waiter and was employed by the T. D. Cook & Co., Inc., caterers, whose place of business is at 88 Boylston Street, Boston. The employment was under the following conditions and circumstances: —

Cook & Co. had a catering contract to serve a banquet at Mount Holyoke College, South Hadley, Mass., on Oct. 9, 1912, and one Francis W. Reeves, who had charge of all men doing outside catering work for T. D. Cook & Co., engaged Gaynor for this particular work at South Hadley on Tuesday, October 8, and told Gaynor that if he would report at the South Station the next morning he would then go to South Hadley with other waiters, and the wage for his work on this particular job was to be \$4 and his transportation paid to South Hadley and return.

Gaynor reported at the South Station at 7 A.M. Wednesday, October 9, and with other waiters left for South Hadley, arriving there about 11.30 A.M. When the men arrived at the en-

trance to the college they were shown to a building where they changed from their street clothes into their dress suits, and were then shown to the building where the spread was to be served. It was while preparing to serve the lunch that Gaynor slipped and fell upon the floor, receiving such injuries as ultimately resulted in his death.

We find that all the outside waiters of the T. D. Cook & Co. are what is known as call men; that this was the first time that Gaynor had ever worked for the T. D. Cook & Co.; that he was not hired for any other work than the particular work that he was doing at the time he met with his unfortunate accident; that when he got through his work of waiting upon the guests at Mount Holyoke College the Cook company would then have no further control over him, and it was optional with Gaynor whether he would or would not return to Boston. In other words, as the witnesses testified, when their work was finished (and it was finished at 5 P.M.) Gaynor would have been entitled to his \$4, whether he did or did not return to Boston, but that he would have lost the benefit of the mileage tickets had he not returned with the other waiters. In other words, he was his own master and not under the control of the T. D. Cook & Co. after 5 P.M. of Wednesday, October 9.

It further appeared in evidence that it was a part of the business of T. D. Cook & Co. to provide and serve banquets and dinners of the character it was called upon to serve at Mount Holyoke College at South Hadley on Oct. 9, 1912, and for such banquets and dinners they had no men who were regularly employed by them; that the custom of the catering business, when such banquets, luncheons or other meals are to be served, is that waiters are secured for those particular occasions by either hiring the men upon application made by the men themselves, who generally, as it appears in evidence, know when a caterer has a contract for such service, or by going to some place where waiters are in the habit of congregating looking for opportunities for service; that a man would work for one caterer one day and another caterer the next day, and one the following day, and so on; that this is the usual custom; that the number of waiters varied, as the occasion demanded, — a large party might call for the employment of 50 or 75 waiters and a small one of 2 or 3 waiters, and it was practically im-

possible from the nature of the business for caterers to regularly keep a number of waiters upon their pay roll; and that the trade custom is to employ waiters who either apply directly or who are obtained for this purpose from one source or another, and it appears that Gaynor, like other waiters, worked for many employers during a day or a group of days.

We further find that Gaynor at the time he met with his accident was an employee within the meaning of the Workmen's Compensation Act, and was injured in the course of and arising out of his employment on Oct. 9, 1912; that death having resulted from the injury, the compensation shall be paid to his widow for three hundred weeks from the date of injury; and that the hospital and medical bills, amounting to \$90 during the first two weeks after the injury, shall be paid by the Standard Accident Insurance Company.

The foregoing evidence was all that was material to the question at issue.

At the close of the evidence the defendants requested the arbitration committee to make the following rulings: that upon all the evidence as a matter of law the plaintiff is not entitled to compensation under the Workmen's Compensation Act for the death of her intestate and for the reason that at the time he was injured his employment was casual as set out in Part V., section 2, of the Workmen's Compensation Act.

The arbitration committee refused to make such rulings, and the defendants duly accepted such refusal to rule, and there being some question as to just how the defendant could preserve his rights, it was agreed by the committee that any and all rights, so far as casual employment was concerned, were to be protected in the event of the case being taken to the Supreme Court.

DUDLEY M. HOLMAN.

THOMAS A. PRIOR.

I dissent from the majority opinion for the reason that it seemed to me that upon all the evidence Gaynor was not an employee within the meaning of the word as defined in section 2, Part V. of the Workmen's Compensation Act, it being my opinion that this employment was casual, and therefore his widow was excluded from receiving any compensation under the act.

THURSTON L. SMITH.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, Pemberton Building, Boston, Mass., Wednesday, July 9, 1913, at 10 A.M., and affirms and adopts the decision of the committee of arbitration.

The Board further finds that the deceased employee, Joseph C. Gaynor, was a waiter in the employ of the T. D. Cook & Co., Inc., at the time he received the injury which resulted in his death; that this was the regular occupation of the said Joseph C. Gaynor; that the business of the said T. D. Cook & Co., Inc., was catering, and it was in the usual course of the business of the said company that the said Gaynor was injured; that the performance of catering contracts was a part of the usual business of the said T. D. Cook & Co., Inc.; that the said Joseph C. Gaynor was employed to perform his usual duties as a waiter in assisting in carrying out the contract which the said company had engaged to perform; that his status is set out in section 2, Part V., of chapter 751, Acts of 1911, as amended by chapters 172 and 571, Acts of 1912, which defines "employee" as follows: "Employee shall include every person in the service of another under any contract of hire, express or implied, oral or written, . . . except one whose employment is but casual, or is not in the usual course of the trade, business, profession or occupation of his employer", the acceptance of such catering contracts being in the regular course of the business of the employer, and the performance of the services of a waiter being the regular occupation of the employee.

The Board further finds that the widow, Emma G. Gaynor, is entitled to the payment of \$7.50 a week from the Standard Accident Insurance Company for a period of three hundred weeks from the date of the injury, Oct. 9, 1912.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
EDW. F. MCSWEENEY.

Decree of Supreme Judicial Court on Appeal.

RUGG, C.J. The facts in this case are that the deceased employee was a waiter employed, at the time his injuries were received, by T. D. Cook & Co., Inc., caterers, having a regular place of business in Boston. It had a contract to serve a banquet at Mount Holyoke College, South Hadley, on Oct. 9, 1912, and on the day before engaged the deceased for services at their banquet. Its agent told the deceased that if he would report at the South Station in Boston the next morning he could go to South Hadley at its expense with the other waiters. The wage for the service was to be \$4, together with transportation from Boston to South Hadley and return. The deceased reported at 7 o'clock in the morning of October 9, reached South Hadley at half-past 11 o'clock in the forenoon, and was injured while preparing to serve the banquet. This was the first time he had ever worked for this employer. The work was finished at 5 o'clock in the afternoon, and the decedent then would have been entitled to \$4 and would have been at liberty either to return to Boston at the expense of his employer or go elsewhere on his own account. It was a part of the regular business of the employer to provide and serve banquets, but for such service no men were regularly employed. The custom of the catering business is that such banquets are served by waiters secured for the particular occasion. Such waiter might work for different employers on the same day, or for many different employers on successive days. The point to be decided is whether the deceased was an employee as defined in the Workmen's Compensation Act, St. 1911, chapter 751, Part V., section 2, as follows: " 'Employee' shall include every person in the service of another under any contract of hire, express or implied, oral or written . . . except one whose employment is but casual, or is not in the usual course of the trade, business, profession or occupation of his employer."

The crucial words to be construed are those contained in the exception out of the class of employee of "one whose employment is but casual." The word "casual" is in common use. Its ordinary signification, as shown by the lexicographers, is something which comes without regularity, and is occasional

and incidental. Its meaning may be more clearly understood by referring to its antonyms, which are regular, systematic, periodic and certain. The significance of this exception in our act is emphasized by its contrast with the provisions of the English act, which is different in a material respect. As is pointed out in *Hill v. Begg*, 1908, 2 K. B. 802, at 805, its words descriptive of the workman are not one whose employment is but casual, but one "whose employment is of a casual nature, and . . . otherwise than for the purposes of the employer's trade or business." This difference in phraseology cannot be treated as unintentional, but must be regarded as deliberately designed. (See Report of Massachusetts Commission on Compensation for Industrial Accidents, 53.) Manifestly, its effect is to narrow the scope of our act as compared with the English act. No one whose employment is "casual" can recover here, while there one whose employment is "of a casual nature" comes within the act, provided it is also for the purpose of the employer's trade or business. It is possible that a distinction as to the character of the employment may be founded upon the difference between the modifying word "casual" used in our act and the words "of a casual nature" in the English act. The phrase of our act tends to indicate that the contract of service is the thing to be analyzed, in order to determine whether it be casual, while in the English act the nature of the service rendered is the decisive test. This distinction appears to have been made the basis of opinion in *Knight v. Buckwill*, 6 B. W. C. C. 160. This consideration is to be noted because the English act was followed in many respects closely by our act, and hence even slight difference of phraseology may be assumed to have significance.

But even the decisions under the English act are plain, to the effect that employment such as that which existed in the case at bar there would be treated not only as casual in respect of the contract for hiring, but also casual in its nature. In *Hill v. Begg*, 1908, 2 K. B. 802, the employment of one to clean the windows of a private dwelling house whenever needed at irregular intervals of about six weeks, for a period of two years, but without regular engagement, was held to be "of a casual nature." (See also *Rennie v. Reid*, 45 Scottish L. R.

814, and *Ritchings v. Bryant*, 6 B. W. C. C. 183, where the facts were similar and like decisions were made.) One who had been employed at several different times to do odd jobs about small cottages, and who at the time in question was hired to whitewash some of them at a fixed price for the whole work, was treated as plainly a casual laborer in *Bargewell v. Daniel*, 98 L. T. R. 257. One employed to cut a hedge for a gross price was held to be a casual laborer in *Toombs v. Bumford*, 106 L. T. R. 823. To the same effect are *Knight v. Buckwill*, 6 Butterworth's, Workmen's Compensation Act, 160; S. C., 57 Solicitors Journal & Weekly Reporter, 246; *Johnston v. Monasterevan General Store Co.*, 42 Irish L. T. & R. 268; S. C., 1909, L. R. I. 108; *Cotter v. Johnson*, 45 Irish L. T. & R. 259. (See also *O'Donnell v. Clare County Council*, 47 Irish L. T. & R. 41, 43; *McCarthy v. Norcott*, 43 Irish L. T. & R. 17.)

It is argued that "or" in the clause quoted from Part V., section 2, should be construed to mean "to wit," or identity with or explanation of that which goes before. Sometimes it is necessary to attribute this signification to the word in order to effectuate the plain legislative purpose. (*Commonwealth v. Gray*, 2 Gray, 501; *Brown v. Commonwealth*, 8 Mass. 59.) It often is construed as "and" in order to accomplish the intent manifested by the entire act or instrument in which it occurs. This frequently is necessary in the interpretation of wills. (*McClench v. Waldron*, 204 Mass. 554, 557; *Clark v. Andover*, 207 Mass. 91, 96.) It is not synonymous with "and" and is to be treated as interchangeable with it only when the obvious sense requires it, or when otherwise the meaning is dubious. But the word "or" in its ordinary use, and also in accurate meaning, is a disjunctive particle. It marks an alternative and not a conjunctive. It indicates one or the other of two or several persons, things or situations and not a combination of them. (*Commonwealth v. Keenan*, 139 Mass. 193; *Galvin v. Parker*, 154 Mass. 346; *Dumont v. United States*, 98 U. S. 142.) It is construed as having a different meaning only when the context and the main purpose to be accomplished by all the words used seem to demand it. This is not such a case. It is impossible to say that the Legislature did not intend to employ the word in its common significance. Indeed, from

what has been said, and especially from the deliberate use upon this point of different words from those of the English act, which our act follows in so many particulars, the opposite conclusion is necessary.

It would be difficult to conceive of employment more nearly casual in every respect than was that of the employee in the case at bar. The engagement was for a single day and for one occasion only. It involved no obligation on the part of the employer or employee beyond the single incident of the work for four or five hours at the college. That would have had its beginning and ending, including the outward and returning journeys (but for the unfortunate accident), within a period of less than twenty-four hours. The relation between the waiter and the caterer had no connection of any sort with any events in the past. Each was entirely free to make other arrangements for the future, untrammelled by any express or implied expectations of further employment. The employment was not periodic and regular, as in *Gillen's Case*, 215 Mass. 96, and in *Dewhurst v. Mather*, 1908 2 K. B. 754. It was in the course of the regular business of the employer. But under our act that is an immaterial circumstance, in view of the other facts that the employment was "but casual." The conclusion seems irresistible that the employment of the deceased was "but casual" within the meaning of those words in our act.

Decree reversed.

CASE No. 230.

OTTO F. JOHNSON, *Employee*.

WADSWORTH, HOWLAND COMPANY, INC., *Employer*.

LONDON GUARANTEE AND ACCIDENT COMPANY, LTD., *Insurer*.

LEAD POISONING A PERSONAL INJURY. EMPLOYEE WHOSE INCAPACITY FOR WORK IS DUE TO LEAD POISONING ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT ENTITLED TO COMPENSATION. SUPREME JUDICIAL COURT AFFIRMS DECISION OF BOARD.

The employee, a paint grinder by occupation, seventy-two years of age, had been employed at his trade for a period of more than twenty years. The quarters in which he worked were dark, poorly ventilated and lacking in preventive

devices which might easily have been installed. The committee of arbitration reports that "it is agreed that a man may be poisoned by lead, and if the body is kept in good condition he may be able naturally to eliminate this poison." In this case, however, on account of grief for the loss of his wife, coupled with old age, the employee "became physiologically unable to withstand the influence of the poison, due to lead, constantly introduced into his system during his employment after July 1, 1912, the result being shown in his loss of weight and other symptoms culminating in a condition of secondary anemia, which brought about his inability to work and caused him to be disabled since March 13."

Held, that the employee is entitled to compensation on account of incapacity for work due to lead poisoning, said lead poisoning being a personal injury arising out of and in the course of his employment.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to Supreme Judicial Court.

Decision. — The Supreme Judicial Court affirms the findings of the Industrial Accident Board.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Otto F. Johnson v. London Guarantee and Accident Company, Ltd., this being case No. 230 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Edward F. McSweeney, chairman, representing the Industrial Accident Board, Robert N. Turner, Esq., of 631 Tremont Building, Boston, Mass., representing the employee, and N. P. Sippelle, Esq., of 6 Beacon Street, Boston, Mass., representing the insurer, heard the parties and their witnesses in the Aldermanic Chamber, City Hall, Malden, Mass., on Monday, May 11, 1913, at 10 A.M.

Otto F. Johnson, seventy-two years old, living at 11 Cross Street, Malden; occupation, paint grinder; average weekly earnings, \$11; employed by the Wadsworth, Howland Company, Inc.; working at the plant at Bell Rock, Green Street, Malden, the Wadsworth, Howland Company, Inc., being insured under the Workmen's Compensation Act by the London Guarantee and Accident Company, Ltd. Otto F. Johnson claims that because of an injury arising out of and in the course of his employment, to wit, lead poisoning, he has been unable to work since March 13, 1913.

Dr. C. S. J. McNeil, 143 Main Street, Malden, testified that he attended Johnson on March 13; examined and prescribed for him. Johnson complained of a chilly sensation over his body, with cramps in his arms, legs, fingers and toes. He had constipation one day and colic and diarrhoea the next. Dr. McNeil found a blue line at the junction of the teeth and gum. Johnson had loss of appetite; temperature, 98; pulse, 64, very low, with a respiration of 18. He had the sweetish odor to his breath characteristic of plumbism. He had never had any of the foot or wrist drops symptomatic of lead poisoning, but had pain in his ankle and wrist joints. He had marked muscle tremors. Examination of Johnson's blood showed secondary anemia. The red corpuscles were only one-third normal, the red cells being pale and bleached. The hæmoglobin averaged about 55, as compared to a normal of 90 to 95. The white corpuscles were 15,000, as compared with a normal of 8,000 to 10,000. The specific gravity of the urine was 1.025, with $\frac{1}{2}$ per cent. of sugar. The employee, Johnson, was eating a great deal of sugar and using Copenhagen snuff. When he discontinued these, the sugar condition disappeared, so Dr. McNeil concluded that this manifestation was rather an acute physiological condition than a chronic one. The diagnosis he made of Johnson after this examination was of secondary anemia, for which he could assign no other cause except lead poisoning. The characteristic symptoms of lead poisoning are diarrhoea, colic, constipation, blue line at junction of the teeth and gums, and wrist and foot drop; other symptoms, shooting pains and sweetish odor to the breath, sweetish taste in mouth, are also characteristic of lead poisoning, the blue line on the gums being an almost positive test. The wrist and foot drop, which were not manifested in Johnson's case, comes only after the disease has become generalized and the nerves have become diseased. Regarding the time this condition had been under way, Dr. McNeil could only give as his opinion that it might have been coming on for some time, but the condition he found in Johnson's case could in all probability have arisen within a matter of months. Lack of food, overwork, age and other causes might have brought about a lowering of resistance which would

have resulted in causing the poison already in the system to bring about the diseased condition shown in his case.

Otto F. Johnson, the claimant, testified that he was seventy-two years old on the 13th of March; had been in this country since 1889, and had been working for the Wadsworth, Howland Company, Inc., since 1892, grinding lead the whole time. About fourteen years ago had some signs of lead poisoning and had stomach trouble since then, but not much. He had two children, one girl and one boy. His wife had died October 2 last, which had a great effect on him. Mr. Johnson could not testify exactly when he began to feel sick, but thought it was some time during last autumn, after he changed to the "new shop;" there was more air in the old place where he worked, the new place where he worked being more closed in. He was the only grinder in that room, but there were other men working there. About three or four weeks after he moved into the new factory he began to feel run down, and within three weeks thereafter had lost 17 pounds. He could not eat, the skin came off the inside of his mouth, he felt "funny" in the legs and ears, and his teeth loosened. He worked for a long time after he got sick, but at last got so weak that he had to stop. Johnson admitted that he had been in the habit of using a form of tobacco called Copenhagen snuff. His lunches were usually eaten at the factory, his daughter bringing his lunch to the factory about quarter of twelve, which he would eat in the same room where he worked, or an adjoining room.

The question to be determined in this case is whether the lead poisoning is an injury as contemplated in the Workmen's Compensation Act, and if so, whether it occurred after the act went into effect, July 1, 1912.

The arbitrators visited the Wadsworth, Howland Company, Inc., factory and inspected the quarters in which Johnson worked, remaining during the lunch hour to see the methods pursued by fellow workmen who were working in lead before and during their noon meal. They found that while there were facilities for the men washing their hands, considering the fact that these men were working in a dangerous poison, these facilities were inadequate; the workmen were, generally speak-

ing, careless about removing lead from their fingers before they began to eat their lunch, and it was probable that under these conditions lead was constantly introduced into the system during the lunch hour. The room in which Johnson worked was dark. Between the machines on which he worked and the windows opening to the air was a raised platform, on which there were other machines; both ventilation and light were very poor and the dry lead in the form of dust could be, and probably was, inhaled during working hours.

The testimony shows that Johnson is an old man, seventy-two years of age, who had been constantly working at his trade of lead grinding for over twenty years. It is probably true from the testimony that at some time in the past he had acute attacks of lead poisoning, but the only case remembered was an attack about fourteen years before the 1st of July, 1912. It is agreed that a man may be poisoned by lead, and if the body is kept in good condition he may be able naturally to eliminate this poison. In the autumn of last year Johnson's wife died. It is apparent that this death had a great effect on him. The arbitrators believe that as a result of his grief, coupled with his age, he became physiologically unable to withstand the influence of the poison, due to lead, constantly introduced into his system during his employment after July 1, 1912, the result being shown in his loss of weight and other symptoms culminating in a condition of secondary anemia, which brought about his inability to work and caused him to be disabled since March 13.

The arbitrators find that while the management of the Wadsworth, Howland Company, Inc., is apparently kindly disposed towards its employees, and willing to protect them from harm, there are not sufficient precautions taken, or facilities afforded, to induce or compel these employees to eliminate from their hands and clothing during the noon meal hour the lead which they have accumulated during their work. The factory conditions at the Malden plant are such that employees are subject to the danger of taking lead into their systems, where it remains, awaiting only a lowering of vitality to manifest itself in disease and disability, as in Johnson's case.

The arbitrators, after full consideration of all the facts, find

that the lead poisoning under the conditions is an injury arising out of and due to Johnson's employment.

The arbitrators find that the quarters in which Johnson worked were dark, poorly ventilated, and the preventive devices which might easily have been installed to protect the employees are lacking.

The arbitrators find, therefore, that Otto F. Johnson is suffering from an injury arising out of his employment and is, in consequence, entitled to disability compensation of one-half his average weekly wages, or \$5.50 per week, during disability, beginning March 13, 1913.

EDW. F. MCSWEENEY.

ROBERT N. TURNER.

Dissenting Opinion.

I herewith submit dissenting opinion from the findings of the majority of the arbitrators in the above entitled action, and assign as reasons therefor the following:—

1. On page 2 of the report at line 5, Dr. McNeil's statement should be stated as follows:—

That in his opinion in all probability the lead-poisoning condition had existed in Johnson's system for a long time prior to the 1st of July, 1912, or ever since Johnson's attack of lead poisoning fourteen years previously, but that the condition in which he found Johnson might have arisen within a matter of months.

2. On page 2, paragraph 2, after the word "Copenhagen" the following words should be added: this snuff was used frequently during working hours. Its quality and method of use would furnish a ready medium for transmitting the lead poison to Johnson's mouth and stomach.

3. Under section 4, as to facilities for washing furnished for the men. A fair and correct statement should be that "the facilities for washing may not have been of the best, but they were adequate if properly used by the men." Under the same paragraph the statement that the "room in which Johnson worked was poorly ventilated." This statement is incorrect, as the said room was as well ventilated as conditions required

and, if anything, better ventilated than the room in which Johnson previously worked.

4. It is not agreed that a man may be poisoned by lead, and if the body is kept in good condition he may be able naturally to eliminate this poison. Medical opinion was to the effect that the poison was not eliminated from his system, but if his body was kept in good condition he might for a long time counteract the effects of the poisoning, but that the only practical way for the lead poison to be eliminated is by the use of certain drugs.

5. That it does not appear affirmatively that the said Johnson ever fully recovered from the attack of lead poisoning which occurred some fourteen years before, or that the lead then in his system was ever fully eliminated, or that the illness of March 13, 1913, was not due to the latent effects of the previous attacks.

6. That it was not shown affirmatively from what source his lead poisoning arose, or that it did not arise wholly or in part from his habit of taking Copenhagen snuff.

7. That the injury complained of is not such a one as is contemplated by the Workmen's Compensation Act.

8. That it was not apparent that the death of said Johnson's wife in the fall of 1912 had any bearing whatever upon his lead poisoning on March 13, 1913.

N. P. SIPPRELLE.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties in the Hearing Room, Pemberton Building, Boston, Mass., Thursday at 10 A.M., and affirms and adopts the findings of the committee of arbitration.

It is agreed, as a matter of fact, that the employee, Otto F. Johnson, is incapacitated for work as a result of plumbism, or lead poisoning. There were three issues presented to the Board for its consideration:—

First. — Was this lead poisoning due to, and did it arise out of and in the course of, his employment?

Second. — Did the injury occur after July 1, 1912, the date upon which the Workmen's Compensation Act became effective?

Third. — Is lead poisoning, or plumbism, arising out of and in the course of the employment a "personal injury" within the meaning of section 1, Part II?

It appears that Johnson had been employed by the Wadsworth, Howland Company, Inc., for more than twenty years as a lead grinder, and was so employed up to March 13, 1913, when he was unable to continue at his labor because of his physical condition, due to the results of lead introduced into his system.

It appeared in the evidence before the committee of arbitration that Johnson had been afflicted with lead poisoning fourteen years ago, but apparently had recovered and had had no recurrence of this disease until he was finally disabled on or about March 13, 1913.

It is understood by science that in lead intoxication, while the eliminating processes of the human body equal the absorption of lead, no harmful result is necessarily noticeable; but when elimination fails, storage of lead in the human system will take place, which may continue for some time before symptoms of poisoning may be observed. Stored in the tissues in an insoluble form, this lead may cause little or no inconvenience, but the individual in this condition is standing, nevertheless, on the brink of a precipice, over which he may be precipitated by many causes, such as the administration of a few grains of potassium iodine for some other illness; mental or other suffering causing a lowering of vitality (Johnson lost his wife by death some four or five months prior to March 13, 1913); the natural, physical changes due to advance of years (Johnson is seventy-two years old), etc. In short, it appears that Johnson had been, for twenty years, absorbing lead poison during his occupation, which had been stored up in his system, and which absorption continued for eight months after the act went into effect, when, elimination failing, the poison stored up manifested itself in the personal injury and the incapacity which resulted therefrom.

The Board finds: —

First. — That the personal injury from which Otto F. Johnson is suffering arose out of and in the course of his employment.

Second. — That there has been an absorption of lead poison

since July 1, 1912, and that the date when the accumulated effects of this poisoning manifested itself, and Johnson became sick and unable to work, was the date of the injury, which is, consequently, subsequent to July 1, 1912.

"Personal injury," as used in the Workmen's Compensation Act, is any injury or damage or harm or disease which arises out of and in the course of the employment which causes incapacity for work and takes from the employee his ability to earn wages, the act providing for the payment of compensation "while the incapacity for work resulting from the injury is total," based upon half the average weekly wages of the employee, and "while the incapacity for work resulting from the injury is partial," based upon "one-half the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter," thus making it clear that the law was intended to provide for the payment of compensation for a "personal injury" which causes incapacity for work. (*Kelly v. Auchenlea Coal Co., Ltd.*, 4 B. W. C. C. 417; *Sheerin v. Clayton & Co.*, 3 B. W. C. C. 583; *Yates v. South Kirby, Featherstone & Hemsworth Collieries, Ltd.*, 3 B. W. C. C. 18; *Alloa Coal Co., Ltd. v. Drylie*, 6 B. W. C. C. 398; *Martin v. Manchester Corporation*, 5 B. W. C. C. 259.)

Johnson's lead poisoning is, within the letter and spirit of the Workmen's Compensation Act, a personal injury arising out of and in the course of his employment, which has impaired the soundness of his health, done harm to and damaged him, and rendered him incapable of work. The employee is to-day, and will probably continue to be until he dies, a hopeless cripple, unable to work because of incapacity due to the effect of the poison taken into his system.

The Board further finds that the employee's incapacity for work resulted from an injury which arose out of and in the course of his employment, the gradual accumulation of the poison in said employee's body subsequent to July 1, 1912, resulting in a personal injury which incapacitated him on March 13, 1913, and that, in so far as the Workmen's Compensation Act is concerned, there is no difference between the incapacity for work caused by lead poisoning and that resulting from a

blow which causes equal incapacity for work, provided the personal injury received arises out of and in the course of the employment. The Board finds that there is due the said employee a weekly payment of \$5.50, said weekly payment to continue during the incapacity for work of said employee, from March 27, 1913, the fifteenth day after the injury, to a date in the future not to exceed five hundred weeks from the date of the injury.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

Decree of Supreme Judicial Court on Appeal.

CROSBY, J. This case arises under the Workmen's Compensation Act, St. 1911, chapter 751, as amended by St. 1912, chapter 571.

The Industrial Accident Board has found that the employee, since March 13, 1913, has been totally incapacitated from labor because of his physical condition, due to the results of lead poisoning or plumbism, and that this is an injury which arose out of and in the course of his employment. The employee is seventy-two years of age, and was employed as a lead grinder continuously for a period of more than twenty years before the date given above, March 13, 1913. The Board further found that he had suffered from lead poisoning fourteen years before, but apparently had recovered and had had no recurrence of the disease until he became ill and was totally incapacitated from work on or about March 13, 1913.

It further appears from the report of the Board that he had been "for twenty years absorbing lead poisoning during his occupation, which had been stored up in his system, and which absorption continued for eight months after the act went into effect, when, elimination failing, the poison stored up manifested itself in the personal injury and the incapacity which resulted therefrom."

The decision of the Board upon all questions of fact being final if there is any evidence to support them, the question is

whether the evidence authorizes the findings. (Pigeon's Case, 216 Mass. 51.)

The main inquiries raised by the appeal are: (1) Has the employee suffered a personal injury within the meaning of the act? (2) If so, what was the date of the injury? (3) If the date of the injury was subsequent to July 1, 1912, did it arise out of and in the course of his employment?

1. Under the act, "personal injury" is not limited to injuries caused by external violence, physical force, or as the result of accident in the sense in which that word is commonly used and understood, but under the statute is to be given a much broader and more liberal meaning, and includes any bodily injury. In this respect the English Workmen's Compensation Act differs from ours, because that act applies only to "personal injury by accident;" yet since the passage of that act its scope has been much enlarged by including certain industrial diseases (Third Schedule, 6 Edward 7, c. 58), although under the English act it has been held in many cases that the words "personal injury by accident" are not limited to injuries caused by violence, but include disease incurred by accident.

Aside from the decisions under the English act, which provides for compensation for "personal injuries by accident," it is clear that "personal injury" under our act includes any injury or disease which arises out of and in the course of the employment, which causes incapacity for work and thereby impairs the ability of the employee for earning wages. The case of *Hood & Sons v. Maryland Casualty Co.*, 206 Mass. 223, is decisive of the case at bar. In that case it was held that for a person to become infected with glanders was to suffer a bodily injury by accident.

This question recently has been considered fully in *Hurle's Case*, *ante*, which decided that an employee having suffered an injury which resulted in total blindness caused by absorbing poison in the course of his employment, which incapacitated him for labor, had suffered a "personal injury" within the meaning of the act. (See also *Brinton's, Limited, v. Turvey* (1905), A. C. 230.)

2. In view of the finding of the Board that Johnson had

suffered from lead poisoning fourteen years before, and had had no recurrence of the disease until he became incapacitated for work on or about March 13, 1913, and the further finding that there had been "an absorption of lead poisoning since July 1, 1912, and that the date when the accumulated effect of this poisoning manifested itself, and Johnson became sick and unable to work, was the date of the injury," we are of the opinion that the Board was warranted in finding that the injury was received when he became sick and unable to perform labor. Until then he had received no "personal injury," although doubtless the previous absorption of lead into his system since July 1, 1912, finally produced the conditions which terminated in the injury. (*Sheerin v. F. & J. Clayton Co., Ltd.*, 3 B. W. C. C. 583; *Yates v. South Kirby, Featherstone, and Hemsworth Collieries, Ltd.*, 3 B. W. C. C. 418; *Ismay, Imrie & Co. v. Williamson*, 1 B. W. C. C. 232; *Brintons, Limited, v. Turvey* (1905), A. C. 230; *Martin v. Manchester Corporation*, 5 B. W. C. C. 259 (1912); *Alloa Coal Co., Ltd., v. Drylie*, 6 B. W. C. C. 398 (1913).

3. As the physical incapacity of the employee for work has been found by the Board to have been caused by the gradual absorption of poison into his system subsequent to July 1, 1912, resulting in personal injury on or about March 13, 1913, there seems to be no reasonable conclusion other than that such injury arose out of and in the course of his employment. (*Hurle's Case*, and cases cited.)

Decree affirmed.

CASE No. 243.

JAMES MARSHALL, *Employee.*

DANIEL MARR & SON, *Employer.*

UNITED STATES FIDELITY AND GUARANTY COMPANY, *Insurer.*

DOUBLE COMPENSATION CLAIMED BY THE EMPLOYEE, WHO ALLEGED SERIOUS AND WILLFUL MISCONDUCT ON THE PART OF HIS EMPLOYER. COMMITTEE DISMISSED CLAIM.

The employee claimed that, by reason of the failure of the subscriber to provide a "tag man" whose sole duty should be to signal the engineer when to start and stop the engine, the said subscriber was guilty of serious and willful misconduct. The evidence showed that the foreman acted as "tag man" when the

necessity arose, and that the engine was not in operation at the time the accident occurred. Therefore, the presence of an employee whose sole duty was to act as "tag man" would not have prevented the injury.

Held, that the employee was not entitled to double compensation, the claim of serious and willful misconduct on the part of the subscriber not being sustained.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of James Marshall v. United States Fidelity and Guaranty Company, this being case No. 243 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Joseph A. Parks, representing the Industrial Accident Board, chairman, James F. Cavanagh of Boston, representing the employee, and William H. Sullivan, Esq., of Boston, representing the insurer, heard the parties and their witnesses at the Hearing Room of the Industrial Accident Board, on Friday, May 23, 1913, at 10 A.M., and on Tuesday, Oct. 14, 1913, at 10 A.M.

The employee, by his attorney, Clarence A. Warren, Esq., claimed that he was entitled to double compensation, alleging serious and willful misconduct on the part of his employer. This was the only question at issue, the insurer having paid compensation on account of total incapacity for work from the fifteenth day after the injury, as provided by the Workmen's Compensation Act.

The claim of the employee, James Marshall, may be summed up as follows: Because of the absence of a man whose sole duty should be that of "tag man," so called, and although George Moore was acting as tag man in connection with other duties, he received a personal injury arising out of and in the course of his employment, having fallen to the ground with a column, up which he had climbed about 20 feet to cut loose the chain of the boom which was employed in placing said column, which he described as having "hooked" and "lifted" as it fell, this having occurred because the operation of the derrick was not being watched by the tag man as the boom was being moved.

The evidence as to the necessity for a "tag man" was contradictory, William P. Spracklin and George S. Tyer testifying as to the necessity, and Alexander McCrae, Bernard Simmons,

George Moore, Samuel Evans and Daniel Marr questioning the necessity for the services of a special "tag man" in connection with the use of the particular kind of derrick in use on this job.

No evidence was introduced to show that any other employee had ever been injured because of the absence of a special "tag man" when this type of derrick was operated, nor was there sufficient evidence to show that the foreman, George Moore, who was acting as "tag man" at the time of the injury, was neglecting his duty. The evidence showed that the engine had not been operated, and that the presence of a special "tag man" would not have prevented the injury to the employee.

The evidence does not show that there was any serious and willful misconduct on the part of the subscriber, nor of any person exercising superintendence. "Serious and willful misconduct," as used in the Workmen's Compensation Act, is any misconduct or act of a subscriber, or of a person exercising superintendence, deliberately and willfully committed, which results in personal injury to an employee. In this case the evidence shows that there was no man employed whose sole duty was that of tag man, the foreman, George Moore, acting as tag man, and performing other duties as well. The evidence also shows that the engine had not been operated, and that the presence of a man whose sole duty was to act as a tag man would not have prevented the employee from receiving a personal injury, since the tag man's duty is solely to signal the engineer when to start and stop the engine. The injury to the employee, therefore, did not result from the failure to employ a tag man, as claimed by the employee.

The committee of arbitration therefore finds upon all the evidence that the employee, the said James Marshall, is not entitled to double compensation under section 3, Part II. of the act, the claim of the said employee, that he was injured by reason of the serious and willful misconduct of a subscriber or of any person regularly intrusted with and exercising the powers of superintendence, not being sustained.

JOSEPH A. PARKS.

JAMES F. CAVANAGH.

WILLIAM H. SULLIVAN.

CASE No. 244.

GEORGE HERRICK, *Employee.*

MILLET, WOODBURY & Co., *Employer.*

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., *Insurer.*

ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.
STRANGULATED HERNIA, FOLLOWING PERSONAL INJURY,
CAUSES DEATH. QUESTION OF DEPENDENCY OF DAUGHTER WHO KEPT HOUSE RAISED. CLAIMANT FOUND TO BE WHOLLY DEPENDENT. COMPENSATION AWARDED. SUPREME JUDICIAL COURT AFFIRMS DECISION OF BOARD.

There were two issues involved in this case: whether the personal injury received caused the strangulated hernia, which resulted in death, and whether the claimant, a daughter, who lived with her father and kept house for him, was wholly dependent upon him for support at the time of his injury. The employee tripped while getting off an elevator and was thrown with some violence against the opposite wall of the hallway. Later, a strangulated hernia developed and death followed. A daughter claimed compensation as a total dependent, and it was in evidence that she was a strong, healthy woman, earning, prior to her mother's death, \$9 a week in a factory. When her mother died she relinquished her position and remained at home to take care of her father. There was no agreement as to remuneration. He was her father, and because he needed her she voluntarily gave up her work and kept house for him. She was, at the time of the hearing, able to earn good wages as a housekeeper. She considered herself wholly dependent upon him for support at the time of the injury. To the question, "Every cent you got for support and every bit of support you got came from your father?" she answered, "Yes."

Held, that the injury which caused death arose out of and in the course of the employment, and that the claimant was wholly dependent upon the deceased at the time of the injury.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to Supreme Judicial Court.

Decision. — The Supreme Judicial Court affirms the findings of the Industrial Accident Board.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of George Herrick v. Employers' Liability Assurance Corporation, Ltd., this being case No. 244 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Dudley M. Hol-

man of the Industrial Accident Board, chairman, Arthur A. Forness, representing the employee, and M. L. Sullivan, representing the insurer, after being duly sworn, heard the parties and their witnesses at the Aldermanic Chamber, City Hall, Beverly, Monday, May 26, 1913, at 10.30 A.M.

We find that George Herrick of 49 Hale Street, Beverly, was employed by Messrs. Millet, Woodbury & Co., of Beverly, who were insured by the Employers' Liability Assurance Corporation, Ltd.; that by an agreement his average weekly wage was \$3; that Miss Caroline E. Herrick, daughter, claimed full dependency under the act.

It appears in evidence that George Herrick was a man over eighty years of age, and that he had permission from his employers, on account of his advanced age, to ride up and down on the freight elevator of the concern when it was in charge of one of the foremen; and at each time that he used the elevator he asked permission so to do, which was regularly granted to him.

It appears in evidence that the elevator was never in charge of any regular elevator man, but that those who used it were generally foremen, and that the elevator was a slow-moving lift rising not more than 40 feet a minute; that it was the habit of employees to get on and off the elevator while it was yet in motion; that employees were forbidden to ride upon this elevator; that, nevertheless, employees did ride upon this elevator, even in the absence of specific permission to do so; that Herrick, however, always asked and received permission; that on Dec. 18, 1912, at about 1 o'clock, Mr. Herrick when getting off the elevator tripped and fell because the elevator was not on a level with the floor at which he was supposed to get off, and was thrown to his knees, receiving a bad shaking up; that upon Jan. 25, 1913, between 7.15 and 8 o'clock A.M., Mr. Herrick, in stepping off the elevator while it was in motion and when it was a little above the floor on which he wished to get off, was thrown with some violence against the opposite wall of the hallway, but was not thrown down; that Mr. Herrick was a very heavy man and well along in years.

According to the testimony of Dr. Frank A. Cowles of 276 Cabot Street, Beverly, a well-known and reputable physician who has been practicing for twenty-three years and who had

been Mr. Herrick's physician for five years, he was called to attend Mr. Herrick on both these occasions; that on January 26 he called upon Mr. Herrick and attended him for five days. In January Mr. Herrick had an attack of indigestion. His last sickness was from February 14 to March 7, during which time Dr. Cowles made twenty-two visits, sometimes calling once a day and sometimes twice.

Mr. Herrick complained of pains in the pit of his stomach and on the right side of his abdomen, especially a great deal of pain in his knees and legs, and the last two weeks, pain in his neck. He was unable to lie down at all and generally sat up in a chair. He also had rheumatism in the knees and legs. On March 5 the doctor for the first time discovered a lump on the right side of Mr. Herrick. He inquired if he had ever had one there before, and Mr. Herrick replied, no, but when he was coughing, especially in the night, a great bunch swelled up. Dr. Cowles examined him and found a rupture about as big as a small hen's egg. That same afternoon he found the rupture still there. He tried to get it back in the abdominal cavity again, but failed. He vomited great quantities of stuff. Dr. Cowles told him that he had a rupture and that it was strangulated; that the rupture had got to be removed, or he would die. He suggested that another physician come in and see it, and Dr. Sears of Beverly was called in that afternoon. He tried to reduce the rupture, but failed. Dr. Sears said the only thing he could suggest was to operate upon him and reduce the rupture, so arrangements were made to operate about 7 o'clock that evening. It was decided by the physicians that it would be impossible to give him ether on account of his condition, and they were going to inject cocaine.

Dr. Cowles called at 6 o'clock and found him in such a weak condition that he injected one-fiftieth of a grain of strychnine. He returned about 7 o'clock and found Mr. Herrick in a complete collapse; he was dying and didn't know any one. Dr. Sears came in at the time appointed and said it was useless to operate, as the man was dying. Mr. Herrick remained in the same stupor, reviving only a little. He became unconscious and died the next morning.

Dr. Cowles testified in response to questions that the falling

out of an elevator on January 25, owing to his weight and age, would have been a good cause for this hernia, and following that cause, hernia would naturally show up within a day or two. A rupture is a protrusion of the bowel through an opening. Sometimes it comes slowly and sometimes like a gush. A strangulated hernia is a form of rupture where you cannot return it to its proper place. Dr. Cowles stated it was his opinion that this fall of January 25 brought on the rupture.

In response to a question by Mr. Sullivan, arbitrator for the insurance company, whether Dr. Cowles, stating that a man eighty-three years of age, having been treated for acute indigestion, would say as a fact that it was so caused by the strangulated hernia, the doctor replied, yes. The doctor stated that men have ruptures for years and never have any pain, yet the lump might be there. He only discovered this rupture by manipulation because of the great size of the abdomen of Mr. Herrick, and by the fact that until Mr. Herrick called his attention to a swelling there, he had not thought of a rupture in connection with the trouble.

According to the testimony of Dr. Harrison G. Blake, it was stated that the hernia might have been caused by the accident on the twenty-fifth day of January. It might have been caused by any fall. That is the usual way for a rupture to be caused, by a fall. Ruptures may also be caused by a strain or by occupation, that is, by heavy labor. Dr. Blake in defining strangulated hernia stated that it is when the bowel goes down through the ring or inguinal canal, and usually gets through the outer ring, so that if the circulation of the bowel beyond the external ring, or that portion of the bowel protruding over the external ring, is stopped you get gangrene.

Dr. Blake was asked what was required to cause strangulation. He said contraction around the vessels of the bowel. A man may go along years with a hernia which isn't strangulated, and then have a severe fit of coughing and it will drive in a little further so that the pressure is sufficient to stop the circulation. When asked if it was necessary to have any great amount of force or strain to wedge it in there, Dr. Blake stated that just simply the strain of walking might produce that wedging there after the rupture had once been formed. He

said it was necessary to have force applied to cause strangulation, that is, some slight force.

Dr. Blake in answer to questions stated that the pressure of the bowel itself might produce this force. Dr. Blake in answer to inquiries by Mr. Sullivan, if he would expect a person receiving hernia from violence caused by a fall to know it at once, replied, that he would expect a man to have some symptoms of it. He would become more conscious of it as he went to do his work; any standing would naturally increase what he had. Dr. Blake, when asked what symptoms he would expect to find if he called on a man who had received a fall such as might have caused hernia or what condition to show that he had the hernia, stated he would expect some pain, not a sharp pain, an uneasy feeling in the groin, and there might possibly be some swelling there. Examination would find out everything.

Mr. Sullivan asked Dr. Blake if he could conceive of a rupture being caused by a fall having been received on the twenty-fifth day of January, and pain coming after the fourteenth day of February for the first time. Dr. Blake stated that he should have thought the man would have had some symptoms of it. Some people notice pain sooner than others and pay more attention to it. Mr. Sullivan asked Dr. Blake the question: If Mr. Herrick had a fall about December 18, from an elevator, landing upon his feet and knees, and on January 25 had a fall from an elevator, striking against some object, and on January 26 was treated for acute indigestion and remained at home a week or ten days, and then returned to his employment and worked two weeks or more, calling a physician on February 14, who afterwards found hernia on March 3 or 4, — whether such a hernia could have been caused by a fall occurring on December 18? Dr. Blake stated that it might have been caused by an accident on January 25.

It appeared in evidence that Miss Caroline E. Herrick was the daughter of George Herrick; that she was wholly dependent upon him for her support. Therefore, we find that according to the medical testimony the fall from the elevator on January 25 produced a hernia which resulted in death on March 7 by strangulation; that the accident was received in the course and

arising out of his employment; that his average weekly wage was \$3; and that Caroline E. Herrick is entitled to recover compensation at the minimum rate of \$4 per week, provided by law, for a period of three hundred weeks.

DUDLEY M. HOLMAN.
ARTHUR A. FORNESS.

Dissenting Opinion.

I am unable to agree with the majority of the committee that the testimony as to the accident of January 25 warrants the finding that the accident produced a hernia which resulted in the death of George Herrick on March 7 by strangulation, or that the facts warranted a finding of dependency.

M. L. SULLIVAN.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, Pemberton Building, Boston, Mass., Wednesday, Sept. 10, 1913, at 2 P.M., and affirms and adopts the findings of the committee of arbitration.

Caroline E. Herrick, a daughter of the deceased, testified before the Industrial Accident Board that she had lived at home with her father, as his housekeeper, since the death of her mother some years before, receiving from him her board and room and other necessities. There was no agreement between them as to remuneration. He was her father, and because he needed her she voluntarily gave up her work in a factory in Salem, where she was earning \$9 a week, and remained at home to take care of him. She was a strong, healthy woman and had no physical or mental ailments, and admitted that she was now able to earn good wages as a housekeeper. She further stated that in addition to his wages her father received \$8 weekly from a married sister and her daughter for board, and \$15 a month as rent for the upper apartment of the house in

which they lived. She considered herself wholly dependent upon him for support at the time of the injury and during the years she remained at home keeping house for him. To the question, "Every cent you got for support and every bit of support you got came from your father?" she answered, "Yes."

It was agreed by the parties, correcting the findings of the committee of arbitration, that the average weekly wages of the employee were \$3.67, the said employee being over eighty years of age, and having been employed as a shoe worker for Millett, Woodbury & Co. for the past twenty-five years. His inability to earn a higher average weekly wage was due to his extreme age.

The insurer submitted requests for rulings, which are attached hereto.

Although the fund from which the deceased paid this money to the claimant was mixed, being derived from earnings received from his employer and the board and rental above mentioned, the Board finds that he intended to pay over to her his average weekly wages, either in the actual cash received from said wages, or a sum equal thereto, from the common fund.

It appeared that the deceased, during the year preceding the injury and for a considerable time before that, supplied the claimant with the necessary money for her support, which the Board finds, as a fact, was practically an amount per week equal to his average weekly earnings from Millett, Woodbury & Co., said employers.

The Industrial Accident Board finds that the claimant, Caroline E. Herrick, was wholly dependent for her support on these payments and contributions to her from the deceased, and accordingly decides that there is due the said claimant from the insurer, the Employers' Liability Assurance Corporation, Ltd., a weekly compensation of \$4 for a period of three hundred weeks from the date of the injury; that is, a total payment of \$1,200.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

Insurer's Requests for Rulings.

1. Upon all the evidence the Board must find that the deceased employee left no person or persons dependent upon his earnings for support, and that the insurer, if liable at all, is liable only for the expenses of the last sickness and funeral expenses.

2. Upon all the evidence the Board must find that Caroline E. Herrick was not dependent upon the earnings of the deceased employee.

3. If the Board finds that Caroline E. Herrick was physically and mentally able to support herself, and to provide the ordinary necessities of life for herself, it must find that she was not dependent upon the injured employee.

4. If the Board finds that Caroline E. Herrick was physically and mentally able to support herself and to provide the ordinary necessities of life for herself, but that she, out of consideration for her father, lived with him and received the necessities of life from him, it must find that she was not totally dependent upon his earnings for support.

5. If the Board finds that Caroline E. Herrick was not in need of the earnings of the deceased in order to obtain the necessities of life, it must find that she was not dependent upon his earnings for support.

6. If the Board finds that Caroline E. Herrick received from the injured employee the necessities of life in exchange for, or as a consideration for, the services rendered to the injured employee as a housekeeper, it must find that said Caroline E. Herrick was not dependent upon the deceased employee.

7. Upon all the evidence the Board must find that the deceased employee left no person totally dependent upon his earnings for support.

8. Upon all the evidence the Board must find that the earnings of the deceased employee were wholly inadequate to maintain himself and Caroline E. Herrick, and that the earnings of the deceased employee did not, in fact, support himself and Caroline E. Herrick.

9. If the Board finds that the earnings of the deceased employee were wholly inadequate to maintain himself and Caroline E. Herrick, and that they did not, in fact, support himself

and Caroline E. Herrick, the Board must find that Caroline E. Herrick was not totally dependent upon the earnings of the deceased employee.

10. Upon all the evidence the Board must find that at the death of the deceased employee, Caroline E. Herrick was physically and mentally able to support herself and to provide for herself the ordinary necessities of life.

11. If the Board finds that Caroline E. Herrick rendered services to the deceased employee which were equal to or exceeded in value the benefit she received from the deceased employee, it must find that said Caroline E. Herrick was not totally dependent upon the earnings of the deceased employee.

12. Upon all the evidence the Board must find that the services rendered by Caroline E. Herrick to the deceased employee were equal to or exceeded in value the benefits received by Caroline E. Herrick from the deceased employee.

13. Upon all the evidence the Board must find that the deceased employee was not under a legal obligation to support and maintain Caroline E. Herrick.

14. If the Board finds that Caroline E. Herrick was dependent upon the deceased employee, it must find that her said dependence upon the earnings of the deceased was but a partial dependency.

15. If the Board finds that the relation of employee and employer existed between Caroline E. Herrick and the deceased employee it must find that Caroline E. Herrick was not a dependent.

16. Upon all the evidence the Board must find that the relation of employee and employer existed between Caroline E. Herrick and the deceased employee, and that there was no relation of dependent and benefactor.

17. Upon all the evidence the Board must find that Caroline E. Herrick was not in need of the earnings of the deceased employee in order to obtain the necessities of life.

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD.,

By its Attorneys,

SAWYER, HARDY & STONE.

Decree of Supreme Judicial Court on Appeal.

SHELDON, J. Under the provisions of St. 1911, chapter 751, Part II., section 7, the question whether Caroline Herrick was dependent wholly, partly or at all upon her deceased father for support was a question of fact. There are many decisions to this effect in analogous cases. (*Houlihan v. Conn. River R.R.* 164 Mass. 155; *American Legion of Honor v. Perry*, 140 Mass. 580, 590; *McCarthy v. N. E. Order of Protection*, 153 Mass. 314; *Daly v. N. J. Iron & Steel Co.*, 135 Mass. 1, 5; *Mulhall v. Fallon*, 176 Mass. 266; *Welch v. N. Y., N. H. & H. R.R.*, 176 Mass. 393, 401; *Boyle v. Columbian Water Proofing Co.*, 182 Mass. 93, 100; *Mehan v. Lowell Electric Light Co.*, 192 Mass. 53, 61, 62; *Wilber v. N. E. Order of Protection*, 192 Mass. 477; *Morena v. Winston*, 194 Mass. 378, 383.) As to all questions of fact, the findings of the Industrial Accident Board are conclusive. (*Pigeon's Case*, 216 Mass. 51; *Donovan's Case*, *ante*; *Bentley's Case*, *ante*.) Where, however, as here, all the evidence is reported, it may become a question of law whether there was any evidence upon which the finding could have been made, as in *Hodnett v. B. & A. R.R.*, 156 Mass. 86. Looking, however, at this report we cannot doubt that there was some evidence that she had been wholly dependent upon her father. She received practically all of his wages; she testified that all of her support came from him. That but for her sense of duty, because she thought that her father needed her care, she might have continued to earn enough for her own support, and to be independent of him, cannot be decisive as matter of law against her claim. The Board well might base its conclusions upon the facts as they were, and not upon what might have been the case if her sense of filial duty had been weaker.

The report shows no error in the manner in which the insurer's requests were dealt with. The decree of the Superior Court must be affirmed.

So ordered.

CASE No. 255.

JOSEPH T. DUPREY, *Employee*.

WILLIAM BANAGHAN, *Employer*.

MARYLAND CASUALTY COMPANY, *Insurer*.

EMPLOYEE WHO IS INCAPACITATED FROM PERFORMING ANY WORK EXCEPT THAT WHICH CAN BE DONE WHILE SEATED ENTITLED TO TOTAL INCAPACITY COMPENSATION BECAUSE OF INABILITY TO OBTAIN SUCH WORK. SUPREME JUDICIAL COURT AFFIRMS DECISION OF BOARD.

The employee, a carpenter, was blind in one eye and partially deaf at the time of the injury, and as a result of the injury was incapacitated for work. At the hearing before the committee of arbitration he stated that he could do "bench work" if he could obtain it. At the hearing on review, however, he claimed to be totally incapacitated from performing any work, and an impartial examination was ordered. This showed that he was unable, in the opinion of the impartial examiner, to perform any work except that which could be done while seated. *Held*, by the committee, that he was partially incapacitated, and compensation awarded accordingly.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board finds that the employee is totally incapacitated for work.

Appealed to Supreme Judicial Court.

Decision. — The Supreme Judicial Court affirms the findings of the Industrial Accident Board.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Joseph T. Duprey v. Maryland Casualty Company, this being case No. 255 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Edward F. McSweeney of Boston, Mass., chairman, representing the Industrial Accident Board; Mr. Philip A. Millet of 172 Chandler Street, Worcester, Mass., representing the employee; and Mr. Neil M. McEachern of 390 Main Street, Worcester, Mass., representing the insurer, heard the parties and their witnesses Thursday, June 12, 1913, at 10.30 A.M.; and at a continued hearing on Saturday, Sept. 27, 1913, at 10 A.M., in the City Hall, Worcester, Mass.

It appears that Joseph T. Duprey, sixty-eight years old, while employed as a carpenter (time worker), at \$15 a week, by

William Banaghan, real estate and builder, Worcester, Mass., insured by the Maryland Casualty Company, at the close of the week's work, on Saturday, Oct. 12, 1912, about 5.30 in the afternoon, was putting away his tools, and while going down stairs made a misstep and fell, sustaining injuries. It was at first claimed that besides several bruises, the right patella was fractured. The insurance company admitted that Duprey was incapacitated from labor as the result of this injury, and paid him compensation of one-half his average weekly wage, \$15 per week, or \$7.50 a week, up to May 9, 1913.

At the instance of the insurance company, Duprey was examined by Dr. W. H. Rose of Worcester, Mass., who reported that he was then able to do some work. An arbitration was asked for on May 26, and was held at the City Hall in Worcester on June 12, 1913. It was brought out in the medical testimony that the injury from which Duprey suffered was not in fact a fracture of the patella, but a rupture of the quadriceps extensor on its lateral attachment to the anterior surface of the patella.

The arbitrators find that Duprey is a man of sixty-eight years of age, blind in one eye, partially deaf, who at the time of the examination walked with extreme difficulty with the help of a cane. The doctors agreed that he had recovered from the immediate effect of his injury as much, considering his age and physical condition, as in all probability he ever would. Duprey said that he was able to do bench work if he could get it.

The arbitrators find that in view of the fact that Duprey agrees that he is able to do bench work or light work if he can find it, total disability should cease on the date of this first hearing, Thursday, June 12, 1913; decision of the matter of partial disability to be held in abeyance, to give Mr. Duprey a chance to find work, or to come to some settlement on the extent of partial disability with the insurance company.

On September 18 it was brought to the attention of the arbitrators that no agreement had been made as to partial disability, and that Duprey had not done any work since the date of the first arbitration meeting, June 12, 1913. A second meeting of the arbitrators was called for Saturday, September 27, at the Worcester City Hall.

The impartial medical reports on this case of Dr. F. D. Donoghue and Dr. John T. Duggan, and the testimony of the employee's personal physician, Dr. Richard J. Shanahan, all agreed as to the injury, and that Duprey had probably recovered from this injury as much as he ever would.

It was agreed that if he could find bench work that he could do it, but that, owing to his age and general physical condition, if Duprey had been thrown out of the work at the time of the accident in October, 1912, without any injury, because of his age and physical condition he would have found great difficulty in getting work at any price.

After considering the testimony of Mr. Cornelius T. Carmody, called as expert as to labor condition and wages at Worcester, the arbitrators find that Duprey can probably now find work only through the kindness of an employer who would be willing to take on a man with his general physical incapacity, including the disability resulting from this injury. If such an employer could be found, Duprey would probably be able to earn from \$7 to \$9 a week. The arbitrators believe it is only a matter of a few years at best when, in the natural course of events, and without this accident, Duprey would have been forced, by increasing infirmities, to give up employment, and while he did retain employment it would be at a constantly diminishing wage. It was agreed by Duprey, and accepted by the representative of the insurance company, that two years' partial disability, based on an estimated earning capacity of one-half of the average weekly wage earned by Duprey at the time of the injury, would be just.

The arbitrators find, therefore, that Joseph T. Duprey is entitled to partial disability from June 12, 1913, when total disability ended, based on an earning capacity of one-half of his average weekly wage at the time of the injury of \$7.50 per week, or \$3.75 per week for a period of one hundred and four weeks, a total of \$390, in addition to the sums paid by the insurance company up to June 12, 1913.

EDW. F. MCSWEENEY.
NEIL M. MCEACHERN.

Oct. 13, 1913.

I find that Joseph T. Duprey was totally disabled on Sept. 27, 1913. He is still now totally disabled and is therefore entitled to \$7.50 per week from June 12, 1913, to the present date, and payments to continue until his total disability has ceased.

PHILIP A. MILLET.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room of the Industrial Accident Board, Pemberton Building, Boston, Mass., Thursday, Nov. 6, 1913, at 10 A.M., and Thursday, Dec. 4, 1913, at 12 M., and, revising the report of the committee of arbitration, finds as follows: —

Dr. Frederic A. Washburn, resident physician of the Massachusetts General Hospital, to whom the employee was referred for an impartial examination, as provided by section 8, Part III. of the act, reported as follows: —

He [Joseph Duprey] has been seen in our out-patient department, and it is the opinion of the surgeon who saw him that he is suffering from a ruptured tendon in his leg, apparently caused by the fall; that he will be unable to walk to any extent unless this is operated upon; that, owing to his age, etc., this should not be undertaken without further talk with him and his family; that his general condition is such that it is believed his usefulness as a worker would not have lasted more than a few years at most; that his incapacity at present is due to his injury, as he is unable to work, except at something allowing him to sit down.

The evidence shows that, at the time of the injury, the said employee was a man of failing physical powers, and that within a few years he would probably have been incapacitated for work as a result of said physical weakness, independent of the injury.

The Board finds upon the above report and the evidence introduced at the hearing before the Industrial Accident Board that, as a result of the injury, the employee is totally incapacitated for all work except that which will allow him to be seated

while engaged in its performance, and that the employee has endeavored to obtain and has been unable to find any work which the incapacity due to the injury will not prevent him from performing. *Willoughby v. Great Western Railway Co.*, 6 W. C. C. 28; *Lee v. Baird & Co., Ltd.*, 1 B. W. C. 34; *Ystradowen Colliery Co. v. Griffiths*, 2 B. W. C. 357; *Lloyd v. Sugg & Co.*, 2 W. C. C. 5.

The Board therefore finds that there is due the employee a weekly compensation of \$7.50 on account of total incapacity for work, dating from June 12, 1913, up to the present time, that is, a total sum of \$187.50, less any payment made on account of partial incapacity for work since June 12, 1913, these payments to be continued weekly in accordance with the provisions of the act, subject to revision if the employee is furnished or is able to obtain work which the incapacity due to the injury will not prevent him from performing.

JAMES B. CARROLL.

DUDLEY M. HOLMAN.

DAVID T. DICKINSON.

JOSEPH A. PARKS.

Decree of Supreme Judicial Court on Appeal.

CROSBY, J. It is admitted that the employee Duprey was injured during the course of his employment and was totally incapacitated for all work from the date of his injuries on Oct. 12, 1912, until June 12, 1913, and that during this period he was paid by the insurer a weekly compensation, in accordance with the terms of the Workmen's Compensation Act (St. 1911, c. 751, Part I., § 9), at the rate of \$7.50, which was a sum equal to one-half his average weekly wages.

The committee of arbitration heard the parties and found that the total disability of Duprey ended June 12, 1913, and that thereafter he was partially disabled for work. Having made these findings, the committee states that "It was agreed by Duprey . . . that the two years' partial disability, based on the estimated earning capacity of one-half the average weekly wage earned by Duprey at the time of the accident, would be just," and made an award for partial disability therefor.

Upon review of the report of the committee of arbitration by the Industrial Accident Board, the latter, after two hearings before it and a report made by Dr. Washburn, "finds upon the above report and evidence introduced at the hearing before the Industrial Accident Board that, as a result of the injury, the employee is totally incapacitated for all work except that which will allow him to be seated while engaged in its performance, and that the employee has endeavored to obtain and has been unable to find any work which the incapacity due to the injury will not prevent him from performing." The Board therefore finds that there was due the employee a weekly compensation of \$7.50, based upon a total incapacity for work, from June 12, 1913.

1. The employee is not precluded by reason of the finding of the committee of arbitration that he agreed to a settlement on a basis of a partial disability, which would cease at the end of one hundred and four weeks from June 12, 1913, because that agreement was made after the committee had found that total disability should cease on June 12, 1913, to which finding, however, the employee did not assent, and did not waive his right to appeal from such finding.

2. The insurer did not put itself in a position to object to the consideration of the report of Dr. Washburn by the Industrial Accident Board. In order that questions as to the admissibility of evidence may be considered by this court on appeal, objection must be made before that Board. (Pigeon's Case, 216 Mass. 51.)

3. We are of opinion that the finding of total disability was warranted if we assume that all the evidence is reported, although this does not clearly appear.

The finding by the Board that the employee is a man of failing physical powers, and that probably he will be incapacitated for work in a few years as a result of such physical weakness, independently of his injury, does not bar him from compensation under the act if his incapacity to work is the result of his injuries. (Lee v. William Baird & Co., Limited, 1 B. W. C. C. 34.)

The finding by the Board that Duprey "is totally incapacitated for all work except that which will allow him to be

seated while engaged in its performance" cannot be construed as a finding that because he is physically able to perform certain labor, therefore he is not totally incapacitated for work. The further finding of the Board, that Duprey "has endeavored to obtain and has been unable to find any work which the incapacity due to the injury will not prevent him from performing," warranted a finding that he was totally incapacitated for work, although he had a limited physical capacity to work and earn money.

This precise question was settled by Sullivan's Case, 218 Mass. 141, recently decided by this court, which adopts the rule laid down by the English courts in construing the English workmen's compensation act, under a statute containing a provision similar to that in our statute.

The provision of our statute is that weekly compensation shall be paid while "the incapacity for work resulting from the injury is total." (St. 1911, c. 751, Part III., § 9.)

This court, in commenting upon these words, said in the Sullivan Case, 218 Mass. 141, 142: "The same words were used in an earlier English statute; and it was held by the Court of Appeal in *Clark v. Gas Light & Coke Co.*, 21 T. L. R. 184, that the object of the act was to give compensation for an inability to earn wages, and that, if an injured employee after repeated efforts could not get an opportunity to earn wages, a finding that his earning power was gone, and therefore that he was under an 'incapacity for work,' was warranted, although he had a physical capacity to work and earn money." In *Ball v. William Hunt & Sons, Limited*, 5 B. W. C. C. 459, 463, it was said by Lord Macnaghten: "Now 'incapacity for work,' as the phrase is used in the schedule, seems to me to be a compendious expression meaning no more than inability to earn wages, or full wages, as the case may be, at the work in which the injured workman was employed at the time of the accident." (*McDonald v. Wilson's & Clyde Coal Co., Limited*, 5 B. W. C. C. 478, *Gillen's Case*, 215 Mass. 96.)

The question whether the Board should have found that there is a total disability for the whole period allowed by the act is not raised by the record and need not be considered.

It follows that the finding of the Industrial Accident Board,

that the employee was totally incapacitated for work, was warranted.

Decree affirmed.

CASE No. 260.

MARY E. GALLAGHER, WIDOW AND ALLEGED DEPENDENT OF
THOMAS F. GALLAGHER, *Employee.*

MOULTON & HOLMES, *Employer.*

ÆTNA LIFE INSURANCE COMPANY, *Insurer.*

SUPREME JUDICIAL COURT, REVERSING DECISION OF BOARD,
DECIDES THAT THE DEPENDENCY OF THE WIDOW, WHO
LIVED APART FROM HER HUSBAND FOR JUSTIFIABLE
CAUSE, SHOULD HAVE BEEN DETERMINED AS A QUESTION
OF FACT. BOARD HAD DECIDED THAT HUSBAND HAD NEVER
BEEN RELEASED FROM HIS LEGAL OBLIGATION TO SUPPORT
HER, AND AWARDED FULL DEPENDENCY COMPENSATION.

The widow of the employee had been living apart from him for justifiable cause for a period of about four years prior to the accident, and had obtained a decree from the Probate Court requiring him to pay the sum of \$4 weekly to her for her support and maintenance. In November, 1912, the court reduced the weekly contribution which he was required to pay to \$2, on the ground of insufficient means to pay the sum previously ordered. Two payments of \$2 each were made under the amended order of the court, the last payment being made a week prior to the date upon which the personal injury occurred which caused the death of the employee. The widow had been obliged, meanwhile, to find employment in order to provide further means for her support, the sums paid her by order of the court not being sufficient for her maintenance.

Held, that the widow was partially dependent to the extent of the contribution of \$2 weekly ordered by the court.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board, revising the decision of the committee of arbitration, finds that the husband had never been released from his legal obligation to support the claimant, and awarded her full dependency compensation.

Appealed to Supreme Judicial Court.

Decision. — The Supreme Judicial Court reverses the findings of the Industrial Accident Board.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Mary E. Gallagher, alleged dependent of Thomas F. Gallagher, v. Ætna

Life Insurance Company, this being case No. 260 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of David T. Dickinson, chairman, Edward L. Logan for the employee, and N. P. Sippelle for the insurer, being duly sworn, heard the parties and their witnesses at the Hearing Room of the Industrial Accident Board, Monday, Sept. 29, 1913, at 10 A.M., and reports as follows: —

The deceased employee received an injury arising out of and in the course of his employment on Dec. 17, 1912, and died therefrom on Jan. 15, 1913. The injury was caused by the employee's right foot being caught between the right forward wheel of the wagon and the wagon itself upon which he was sitting, thereby causing a strain to his cords and ligaments.

The claimant is a widow of the deceased, having been married to him on Dec. 26, 1882. She had been living apart from him for justifiable cause for about four years prior to the accident. About three years before his death she obtained an order from the Probate Court ordering him to pay towards her support and maintenance the sum of \$4 per week. After making five payments he defaulted, and on contempt proceedings being brought by the claimant, he made eight more payments under said order, aggregating \$32, when he defaulted again.

On the last of November, 1912, the amount he was ordered to pay was reduced by the court to \$2 a week, on the ground of insufficient ability to pay the amount of \$4, as previously fixed. He made two payments under this amended order, aggregating \$4, the last payment being made Dec. 10, 1912. The accident and injury to him on December 17 incapacitated him from work, and apparently prevented the next weekly payment due. As above stated, he died on Jan. 15, 1913.

During this period of four years, during which she was living apart from her husband, she supported herself by her own earnings, with the exception of the aid from the above contributions from her husband, amounting to \$56.

During the year before his death he contributed only \$18 towards her support. He however had, before and during the period of separation, kept the weekly premiums, when due,

paid on a policy insuring his life for the benefit of the claimant, his wife.

There are three children living, all being of age.

The claimant, before the hearing, had subscribed her name to a written statement, drawn up by a representative of the insurer, of a conversation with her in which she stated, "I have been self-supporting for the past five years, and never depended on Mr. Gallagher for support during that time, as I could not." The committee finds that she meant by this that she had never been dependent on him as a whole during these years, but only to a small extent. The bill for the funeral expenses of the deceased has been paid by the claimant, amounting to \$273.

The committee finds that the claimant was partially dependent for her support upon the earnings of the deceased at the time of the injury to the extent of the contribution of \$2 per week, which she had obtained through a court order, said proceedings being a part of the effort she had been making for some time to obtain assistance from her husband towards her support; and that she is entitled to a payment from the insurer, as compensation for such partial dependency, in accordance with section 6 of Part II. of the Workmen's Compensation Act, of the sum of \$1 per week for a period of three hundred weeks from the date of the injury, less two weeks' compensation paid the employee prior to his death.

DAVID T. DICKINSON.

N. P. SIPPRELLE.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, Pemberton Building, Boston, Mass., on Thursday, Jan. 1, 1914, at 11.30 A.M., revising the report of the committee of arbitration, and finds and decides as follows:—

Thomas F. Gallagher, the deceased employee, received a

personal injury arising out of and in the course of his employment on Dec. 17, 1912, from which he died on Jan. 15, 1913. The average weekly wages of the employee were \$15. His widow, Mary E. Gallagher, had been living apart from him for justifiable cause for about four years prior to the accident, and had obtained a decree from the Probate Court, about three years before the death of the said employee, requiring him to pay the sum of \$4 weekly to her for her support and maintenance. In November, 1912, the Probate Court reduced the amount that the said employee was required to pay to \$2 weekly, on the ground of insufficient ability to pay the sum previously ordered. Two payments of \$2 each were made under the amended order of the court, the last payment being made about Dec. 10, 1912, the personal injury sustained on Dec. 17, 1912, apparently preventing the next payment. Mary E. Gallagher, the said widow, had been obliged to find employment in order to provide further means for her support, the sums paid her by order of the court not being sufficient to maintain her.

Section 7, Part II. of the Workmen's Compensation Act provides that a wife who lives with her husband at the time of his death "shall be conclusively presumed to be wholly dependent for support upon a deceased employee," but makes no specific provision for a case like this, in which the wife, having justifiable cause for her action, leaves her husband and obtains a decree from the Probate Court which protects her rights as his wife and requires him to contribute to her support.

The Board is of the opinion that, if a wife who is living with her husband at the time of his death is conclusively presumed to be wholly dependent upon his wages for support, a wife who is justified in law in leaving her husband, and who seeks the protection of her rights in every possible way, and endeavors to secure the support to which she is legally entitled, is equally dependent upon him for support. The widow, in this case, had not released her husband from his legal obligation to support her, and, as a matter of fact, she was just as much dependent upon him as if they were living together under the same roof. She had never surrendered her right to be supported by her husband, and this right to support con-

tinued to be in force, by decree of the court, just as effectively as though she were in fact living with him at the time of his death.

One of the main purposes of the Workmen's Compensation Act is to provide compensation for widows and children, and prevent them from being thrown upon the public for support. Compensation is awarded, not strictly according to the rules of common law, but according to the realities of the case. It is intended to compensate those who are dependent in law, or in fact, upon the earnings of another; and in a case like this, where the wife does all that she possibly can to preserve the marital relation, and where, by reason of the conduct of her husband, she is justified in leaving him, and protects her rights in every way possible, she is entitled to full compensation under the law. Mere physical living together is not regarded as the test as to whether the wife is entitled to the benefit of the conclusive presumption under the statute.

The Industrial Accident Board therefore finds that Mary E. Gallagher, the said widow, should recover a weekly compensation of \$7.50 from the insurer, for a period of three hundred weeks from the date of the injury, Dec. 17, 1912, less two weeks' compensation paid the employee, the said Thomas F. Gallagher, on account of total incapacity for work prior to the fatal termination of the said injury.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

Decree of Supreme Judicial Court on Appeal.

CROSBY, J. This case arises under the Workmen's Compensation Act (St. 1911, c. 751, Part II., § 7), in which the widow of the deceased employee seeks to recover compensation upon the ground that she is conclusively presumed to have been wholly dependent upon him at the time of his death.

The following are the material facts as found by the Industrial Accident Board: Thos. F. Gallagher, the deceased employee, received a personal injury arising out of and in the course of his employment on Dec. 17, 1912, from which he

died on Jan. 15, 1913. His widow, Mary E. Gallagher, had been living apart from him for justifiable cause, for about four years before the accident, and about three years before his death had obtained a decree from the Probate Court ordering him to pay her the sum of \$4 weekly for her support. In November, 1912, the amount so ordered to be paid her was reduced to \$2 per week. The husband had but partially complied with these orders at the time of his death, and the wife has been obliged to support herself by her own labor, except for such sums as were paid her under order of the Probate Court.

At the time the injury was received by the employee the act provided that: "The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee: (a) A wife upon a husband with whom she lives at the time of his death. . . . In all other cases questions of dependency in whole or in part shall be determined in accordance with the fact, as the fact may be at the time of the injury." (St. 1911, c. 751, Part II., § 7.) The Industrial Accident Board ruled that: "If a wife who is living with her husband at the time of his death is conclusively presumed to be wholly dependent upon his wages for support, a wife who is justified in law in leaving her husband, and who seeks the protection of her rights in every possible way and endeavors to secure the support to which she is legally entitled, is clearly dependent upon him for support."

We are of the opinion that this ruling was wrong, and that the presumption does not apply to a case where a woman is actually living apart from her husband, although this condition may exist without fault on her part.

In construing this clause of section 7, this court said, in *Nelson's Case*, 217 Mass. 467, 469: " 'With whom she lives' in (a) means living together as husband and wife in the ordinary acceptation and significance of these words in common understanding. They mean maintaining a home and living together in the same household, or actually cohabiting under conditions which would be regarded as constituting a family relation." (*Bentley's Case*, 217 Mass. 79.)

Since the death in this case occurred, the Legislature, by

St. 1914, c. 708, § 7, has amended clause (a) by further providing that, if at the time of the husband's death, the Industrial Accident Board shall find the wife was living apart for justifiable cause or because he had deserted her, and is conclusively presumed to be wholly dependent upon her husband.

It is plain that clause (a) of section 7 of the statute as it stood at the time of the death of this employee did not apply to his wife because she was not living with him at that time.

The Board should have determined as a fact the question of dependency under the last clause of section 7, without reference to the conclusive presumption created in clause (a). The case should be remanded to that Board for further hearing.

Decree reversed.

CASE No. 266.

FLORENCE H. THOMPSON, *Employee.*

W. L. DOUGLAS SHOE COMPANY, *Employer.*

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., *Insurer.*

INJURY RECEIVED BY REASON OF PLAY OR SPORT DOES NOT ARISE OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

Three employees engaged in a race during the noon hour, the claimant falling and receiving an injury which incapacitated her for work.

Held, that the injury did not arise out of and in the course of the employment.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Florence H. Thompson *v.* Employers' Liability Assurance Corporation, Ltd., this being case No. 266 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Joseph A. Parks of the Industrial Accident Board, chairman, Dennis D. Driscoll of Boston, Mass., representing the employee, and W. Lloyd Allen of Boston, Mass., representing the insurer, heard the parties and their witnesses in the Council Chamber, City Hall, Brockton, Mass., Tuesday, July 15, 1913, at 10.45 A.M.

Florence H. Thompson, employee, claimed that on Wednesday, Jan. 29, 1913, about 12.10 P.M., she received an injury which totally incapacitated her for work several weeks later.

Aside from the question as to whether or not the alleged injury was the cause of her present incapacity for work, the insurer disputed the claim on the ground that if the injury actually did occur as claimed, it resulted from play or sport, and did not arise out of and in the course of the employment of the said Florence H. Thompson.

Jane B. Motteau, residing at 57 Spring Street, Brockton, and Marion F. Heritage, residing at 18 Springfield Street, Brockton, who are employed at the factory of the W. L. Douglas Shoe Company, and who were intimate with the claimant, testified that the injury which occurred on Jan. 29, 1913, happened during the lunch hour, and fixed the time at about ten minutes past 12 in the afternoon. They stated that they were in the habit of eating their lunch at Miss Thompson's desk. After they had finished, it was suggested that they visit the lunch room, and the three started, crossed the first bridge, and when they came to the second bridge all three started to run. Miss Motteau led, with Miss Thompson following. The latter gave Miss Motteau a push and ran speedily after her. Miss Heritage did not start running until towards the end of the journey. Suddenly, when within two feet of the door at the end of the bridge, Miss Thompson fell. Miss Motteau turned around and noticed Miss Thompson had fallen, was taken with a fit of laughter and did not offer to assist the claimant to arise. Miss Heritage then came along, dropped on her knees to help Miss Thompson arise, but she also was taken with a laughing fit. Finally Miss Heritage did assist her to arise, but no effects of the injury were apparent except that the claimant was upset and nervous. Miss Thompson's testimony was the same as her companions, except that she thought she had stopped running before she fell, and that she thought she was within ten feet of the door. She could find no bruise or external evidence of any injury as a result of her fall.

Miss Thompson stated that she had been attended by three physicians, two of whom diagnosed the case as "inflammation of veins," the last doctor stating that he could not definitely

say what her ailment was. The most any doctor would say was the fall might possibly have caused her present illness. No medical testimony was offered in this case.

The committee of arbitration finds, upon the evidence, that the injury which Florence H. Thompson received on Jan. 29, 1913, was the result of play or sport, and did not arise out of and in the course of her employment. She is therefore not entitled to medical services or compensation under the Workmen's Compensation Act.

JOSEPH A. PARKS.
W. LLOYD ALLEN.
D. D. DRISCOLL.

CASE No. 283.

MARY E. TOY, MOTHER OF MARY H. TOY (MINOR), *Employee*.
LOWELL INSULATED WIRE COMPANY, *Employer*.
MARYLAND CASUALTY COMPANY, *Insurer*.

INCAPACITY DUE TO INJURY ARISING OUT OF AND IN THE COURSE
OF THE EMPLOYMENT AND NOT TO ANOTHER CAUSE APART
THEREFROM.

The employee received a personal injury by stepping on a bobbin that lay on the floor in her place of employment, seriously wrenching her left knee. This knee had been slightly injured from another cause several months previous, incapacitating her for work at the time for two days. The latter injury was the cause of all her incapacity for work at the time of the hearing.

Held, that the employee was entitled to compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Mary H. Toy v. Maryland Casualty Company, this being case No. 283 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of David T. Dickinson, chairman, Larkin T. Trull, Esq., for employee, and Walter Haliburton, Esq., for insurer, heard the parties and their witnesses in the Aldermanic Chamber, City Hall, Lowell, Mass., on Tuesday, Sept. 16, 1913, at 10.30 A.M.

The committee finds that said employee received an injury arising out of and in the course of her employment, at Lowell, April 1, 1913; that the injury was sustained by stepping on a bobbin that lay on the floor, thereby seriously wrenching her left knee. This knee had been somewhat injured from another cause in November previous, which incapacitated her from work at the time for about two days, but had not incapacitated her from labor thereafter up to the time of the injury on April 1. As a result of the latter injury she was treated by her family physician and also at a hospital. The knee has since been kept in a plaster cast up to the time of the hearing, which was a reasonable and proper treatment, but will soon be released therefrom owing to its improved condition.

The committee finds that she has been wholly incapacitated from work from April 1, the date of the injury, to the present time, and so continues; that her average weekly wages at the time of said injury were \$5, and that she is entitled to a weekly compensation of \$4, beginning on April 15, 1913, up to the present time, and during the further continuance of said incapacity; and that there is due to Dr. Charles L. Sweetsir of Lowell the sum of \$8 for reasonable medical services rendered to her by reason of said injury during two weeks thereafter.

DAVID T. DICKINSON.

LARKIN T. TRULL.

WALTER S. HALIBURTON.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, Pemberton Building, Boston, Mass., Thursday, Oct. 30, 1913, at 11 A.M., and affirms and adopts the findings of the committee of arbitration.

JAMES B. CARROLL.

DUDLEY M. HOLMAN.

DAVID T. DICKINSON.

EDW. F. MCSWEENEY.

JOSEPH A. PARKS.

CASE No. 289.

JOHN ERICKSON, *Employee*.

AMERICAN STEEL AND WIRE COMPANY, *Employer*.

MASSACHUSETTS EMPLOYEES INSURANCE ASSOCIATION, *Insurer*.

EMPLOYEE AWARDED COMPENSATION FOR PERSONAL INJURY
BY REASON OF PALMAR ABSCESS AND SEPSIS CAUSED BY
INFLAMMATION WITHOUT VISIBLE EXTERNAL WOUND.

The employee received a personal injury by reason of the extreme pressure from the shears which he used in cutting a coil of wire, a septic hand and palmar abscess resulting without visible external wound.

Held, that this was a personal injury under the act.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of John Erickson v. Massachusetts Employees Insurance Association, this being case No. 289 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Joseph A. Parks, representing the Industrial Accident Board, chairman, Fred W. Cronin of Worcester, representing the employee, and A. E. Newton of Worcester, representing the insurer, heard the parties and their witnesses at the Aldermanic Chamber, City Hall, Worcester, Mass., Saturday, Aug. 23, 1913, at 10.30 A.M.

John Erickson was employed in the cutting and filing department of the American Steel and Wire Company of Worcester. While in the course of his employment on January 24, cutting the end of a coil of wire with shears, he claimed that the pressure from the shears caused a palmar abscess which incapacitated him from work until March 6, 1913.

The contention in this case was that the employee had not received any injury while in the course of his employment. It was agreed that his disability ended on March 6 and that the average weekly wage was \$11.89.

It appeared in evidence that Erickson had said the trouble was not caused by his work, which was denied by the injured

man and Charles B. Stevens, M.D., who had attended him. In an affidavit signed by Dr. Charles B. Stevens, submitted after the hearing by agreement between the parties, he stated that he attended John Erickson for septic hand and palmar abscess. In his opinion the infection causing the palmar abscess entered from inflammation in connection with the callosities of the palm, and that palmar abscess can result from such inflammation without any visible external wound. The injured man had told him he had received the injury in the course of his employment with the American Steel and Wire Company, and it was evident that the trouble resulted from such employment, as had been described.

The committee finds, therefore, that John Erickson received an injury arising out of and in the course of his employment, and that he is entitled to reasonable medical and hospital attention for the first two weeks following the injury, and to compensation up to and including March 5, 1913, at which time his incapacity for work ceased, at the rate of \$5.95, being half his average weekly wage, per week, beginning with the fifteenth day after the injury, a period of three and six-sevenths weeks, amounting to \$22.95.

JOSEPH A. PARKS.
FRED W. CRONIN.
ALBERT E. NEWTON.

CASE No. 292.

WILLIAM DIAZ, *Employee*.

FRED T. LEY & Co., *Employer*.

CONTRACTORS MUTUAL LIABILITY INSURANCE COMPANY, *Insurer*.

INCAPACITY FOR WORK. PERSONAL INJURY BY REASON OF SUDDEN DROP OF ELEVATOR WHILE CARRYING HOD OF BRICKS. NERVOUS SHOCK AND DISTURBANCE ADD TO INCAPACITY. MALINGERING IN QUESTION. IMPARTIAL PHYSICIAN REPORTS. COMPENSATION AWARDED. SUPREME JUDICIAL COURT AFFIRMS DECISION OF BOARD.

The employee, a hod-carrier, was carrying a hod of bricks on his shoulder when the elevator upon which he was standing suddenly descended a distance of five stories, the workman being very much bruised on his chest, back and side, and

suffering from nervous shock and disturbance in consequence of the injury. The question of malingering was raised by the insurer, and an impartial physician was called upon to examine the employee and file a report. He reported, "That he took, and until to-day, has taken his pains too seriously is beyond question, but such a misinterpretation is a very natural consequence of his unpleasant experience, and so, I think, he is not malingering."

Held, that the employee is entitled to compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to Supreme Judicial Court.

Decision. — The Supreme Judicial Court affirms the findings of the Industrial Accident Board.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of William Diaz v. Contractors Mutual Liability Insurance Company, this being case No. 292 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of James B. Carroll of the Industrial Accident Board, chairman, Lafayette Burt, representing the employee, and Harry R. Elder, representing the insurer, heard the parties and their witnesses at the Court House, Springfield, Mass., at 11.30 A.M., June 26, 1913. The plaintiff was also represented by Arthur S. Kneil, and the Contractors Mutual Liability Insurance Company by Norman F. Hesseltine, who claimed that there was no substantial injury resulting from the accident.

This employee, a Portuguese, was working for the Fred T. Ley company, 499 Main Street, Springfield, Mass., on March 10, 1913. While carrying a hod of bricks on his shoulder the elevator upon which he was standing suddenly descended a distance of five stories, and he thereby suffered personal injury, being very much bruised in his chest, back and side. He was taken to the Springfield Hospital, where he was under attention for a period of six days.

Dr. N. J. Dillon, the physician who first saw the injured man after the accident, testified that he found bruises on his back, right side and chest. On the afternoon of the same day he saw him again, and as the man complained of pain and he could see nothing the matter with him, he sent him to the

Springfield Hospital for observation. He did not see him again until April 4, at the request of Mr. Ross, the adjuster for the Contractors Mutual Liability Insurance Company, when he examined him and found nothing objective, although the man complained of pain. He had taken no notice as to whether or not fright had caused any mental disturbance, and had not tested his nervous reactions, and admitted that such a condition might exist without any objective signs. He told the employee then that he was able to go to work, and said also that he had difficulty talking with him, although Mr. Ross assisted in this regard. In his opinion the employee was able to go to work within the two-week period.

Dr. Charles J. Downey, called by the injured man after he had been discharged from the hospital, saw him at his home on the 21st of March. He testified that he found him in bed, and the injured man told him he had had a severe accident and was having a great deal of pain. His temperature was 103°, and his pulse rapid. Dr. Downey saw no evidence that his condition arose from his right side, but he had a reddened throat and was suffering from influenza. He prescribed for him, and saw him again on the 22d and 24th. On the last date he found him up and dressed, but still complaining of his side, and he indicated that he was considerably disturbed over his injury, and when the doctor told him that he was able to go to work, and suggested that he try to get some light work with the Fred T. Ley company, he said he would not be able to work all summer. He had apparently recovered from the influenza, and the doctor could find nothing the matter with the side. "It was evident that it was fixed in his mind that he had had a serious injury and pain in his side, whether conscious or otherwise." He had given him powders for the fever, but did nothing for the side, as it was strapped at the time, for the injured man left the hospital with the plasters on. He had complained of his back, and the doctor prescribed alcohol, as he was "aching all over from the grip." The doctor agreed that it was quite possible that such a fall might cause a nervous state or inspire an honest belief in injury. In his opinion this employee was as able to work within two weeks after the accident as he is now.

Charles R. Ross, adjuster for the insurance company, testified that he saw Diaz at his home on April 4, who said he was still sick. Dr. Dillon, at Mr. Ross' request, examined the employee that day, as stated above, and found nothing the matter with him. He saw him afterward on April 16 and May 14 at the man's home, and each time advised him to go back to work, telling him that "there would not be a cent in it for him," and that he "had better go back to work." Diaz said he would not be able to work all summer, and he would go back when he was well. It was difficult to talk with him, as Mr. Ross talked in Spanish and Diaz partly in English and partly in Portuguese, which Mr. Ross understood a little.

On May 21 the employee was examined by Dr. Philip Kilroy of Springfield, at the request of the Industrial Accident Board, and he reported as follows:—

Undoubtedly at some time in the drop, Mr. Diaz must have had an experience neither gentle physically nor soothing mentally. But he had no bones broken, and no serious anatomic injury. He was bruised and bumped with resulting local swelling which, however, disappeared in a day or two.

As to his present condition. Malingering is a word as easy as it is harsh to use; that the man was hurt in the sense that he suffered pain is beyond question; such a simple performance as falling down stairs or falling off a step ladder may, from nothing but contusions, give pain sufficient to incapacitate a person for a day or more; this I can personally testify to. On the other hand, that he took, and until to-day has taken, his pains too seriously is also beyond question, but such a misinterpretation is a very natural consequence of his unpleasant experience, and so I think he is not malingering. He needed not a blunt assurance that there was nothing the matter with him, but a sympathetic explanation of how he was keeping up his pain by thinking too much about it; the former course made him suspicious of being imposed upon, especially because of his limited knowledge of the English language; the latter course I have meted out to him this afternoon, and he left here much relieved, agreeing to forget it and to go to work as soon as he can get it — work.

It's now ten weeks since his accident. I believe that with tactful and patient handling he could have been put in a state of mind as well as body that would have permitted him to go to work in a couple of weeks after the accident, and yet I don't believe that his ten weeks' idleness have been due, in any sense, to dishonesty or laziness or a hope of gain.

The committee of arbitration therefore finds, on the evidence submitted and on the report of Dr. Kilroy, that William Diaz was employed by the Fred T. Ley company at an average weekly wage of \$15.40; that his injury arose out of and in the course of his employment; that he was incapacitated as a result of this injury for a period of ten weeks and three days from March 10, 1913, the date of the injury, and is entitled to compensation from March 24, the fifteenth day after the injury, to May 22, at the rate of \$7.70 per week, being half his average weekly wages, amounting to \$80.30.

JAMES B. CARROLL.
LAFAYETTE BURT.

Dissenting Opinion.

I find that Diaz was able to return to work within two weeks from the date of the accident, and that he is not entitled to compensation.

HARRY R. ELDER.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the insurer, the employee not being represented, at the Hearing Room of the Industrial Accident Board, Pemberton Building, Boston, Mass., Wednesday, Sept. 10, 1913, at 11.15 A.M., and affirms and adopts the findings of the committee of arbitration.

The Board further finds upon the evidence, and the report of the duly qualified impartial physician, Dr. Philip Kilroy of Springfield, that the employee, the said William Diaz, was incapacitated for work from March 10, 1913, the date of the injury, to May 22, 1913, in consequence of the injuries and resulting nervous shock and disturbance following a sudden drop of five stories in a freight elevator while carrying a hod of bricks.

The Board further finds, correcting the report of the committee of arbitration, that the said employee was entitled to medical and hospital services during the first two weeks after

the injury, to wit, from March 10, 1913, to March 23, 1913, both dates inclusive, and to compensation from March 24, 1913, to May 21, 1913, both dates inclusive, a period of eight and three-sevenths weeks, at \$7.70 a week, that is, to the payment of \$64.90 in full for all incapacity for work resulting from the injury sustained by him on March 10, 1913.

JAMES B. CARROLL.
DAVID T. DICKINSON.
JOSEPH A. PARKS.
EDW. F. MCSWEENEY.
DUDLEY M. HOLMAN.

Decree of Supreme Judicial Court on Appeal.

DE COURCEY, J. The employee was standing in a freight elevator, and carrying a hod of bricks on his shoulder, when the elevator suddenly dropped a distance of five stories. He was much bruised in his chest, back and side, and was taken to the hospital for treatment. The Industrial Accident Board, after hearing, affirmed and adopted the findings of the committee of arbitration, and found that the employee was incapacitated for work from March 10, 1913, the date of the accident, to May 22, 1913, in consequence of his physical injuries and the nervous shock and disturbance; that he was entitled to hospital and medical services during the first two weeks after the accident, and to compensation from March 24, 1913, to May 21, 1913, both dates inclusive, or \$64.90 in full for all incapacity for work resulting from the injury sustained by him. The Superior Court rendered a decree in accordance with said decision, and the case is heard on the appeal of the insurance company from that decree.

The Workmen's Compensation Act expressly provides that such decree of the Superior Court "shall have the same effect . . . as though rendered in a suit duly heard and determined by said court, except that there shall be no appeal therefrom upon questions of fact. . . ." (St. 1911, chapter 751, Part III., § 11, as amended by St. 1912, c. 571, § 14.) No ruling of law made or adopted by the Industrial Accident Board is

before us for review. The contention of the insurance company is that the employee did not suffer any injury which would incapacitate him beyond the first two weeks. But the finding of the Industrial Accident Board on that question of fact has the weight and effect of the verdict of a jury. Clearly, we cannot say that the facts stated in the report do not warrant the finding of the Board as to the extent of the employee's injuries, especially in view of the report of the duly qualified impartial physician that in his opinion the injured employee was not malingering, and that ten weeks' idleness was not due to dishonesty or laziness or a hope of gain. (See Pigeon's Case, Oct. 22, 1913.)

Decree affirmed.

CASE No. 296.

ODILE TREMBLAY, *Employee.*

WOODBURY SHOE COMPANY, *Employer.*

TRAVELERS INSURANCE COMPANY, *Insurer.*

EMPLOYEE HAVING NO PHYSICAL INCAPACITY DUE TO THE INJURY NOT ENTITLED TO COMPENSATION BECAUSE OF INABILITY TO OBTAIN WORK.

The employee received a personal injury by reason of a fall on the stairs of the factory in which he was employed, striking on his back and being incapacitated thereby for a period of twenty-one days. Seven days of this incapacity period occurred at intervals subsequent to the first two weeks after the injury. About four months after the injury the factory shut down and the employee was unable to obtain any employment from the date of the shut-down, April 8, 1913, to June 18, 1913, when he found a position at which he has earned a higher average weekly wage than at the time of the injury. He claimed compensation for the period during which he was unable to obtain employment. The evidence showed that he had suffered prior to the injury from the after effects of a disease of childhood, and the impartial physician reported that he had wholly recovered from the effects of the injury.

Held, that an employee having no physical incapacity due to the injury is not entitled to compensation because of inability to obtain work.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Odile Tremblay

v. Travelers Insurance Company, this being case No. 296 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of Edward F. McSweeney, chairman, representing the Industrial Accident Board; A. C. Cummings, Esq., of South Hamilton, Mass., representing the employee; and Charles D. C. Moore, Esq., of 38 Exchange Street, Lynn, Mass., representing the insurer, heard the parties and their witnesses at the Aldermanic Chamber, City Hall, Beverly, Mass., on Tuesday, July 1, 1913, at 2.30 P.M.

Odile Tremblay is thirty-nine years old, and resides in South Hamilton, Mass.; his average weekly wage is \$13. He is a stock fitter in the sole department of the Woodbury Shoe Company, Beverly, Mass., which is insured by the Travelers Insurance Company.

On Friday, Dec. 20, 1912, at 8.30 A.M., while walking down stairs during the course of his employment, Tremblay slipped and fell, striking on his back. Dr. Stickney of Beverly was called, and Tremblay was taken to his home, where he remained for fifteen days. He then returned to work at the Woodbury factory, and he alleged that because of his injury he was able to continue at work for only three days; after this he worked intermittently until April 8, when he ceased work for the Woodbury Company.

From the evidence submitted to the arbitrators it appears that Tremblay was lame and had a wobbly gait, due to the after effects of some disease of his childhood, probably infantile paralysis.

James Gagan, foreman of the room in which Tremblay worked, testified that Tremblay's employment with the Woodbury Shoe Company terminated on April 8 because of lack of work, and not for any reason of disability or inability properly to do his work.

From April 8 to June 18 Tremblay did not work. Since June 18 he has been employed, getting more wages than at the time of the injury on December 20.

The question at issue is whether Tremblay's unemployment from April 8 to June 18 was because of disability resulting from the injury on December 20.

Dr. John G. Cochrane of Hamilton, Mass., examined Tremblay on May 26 for the Travelers Insurance Company, and could not find any physical signs that he was suffering at that time from the injury on December 20.

Dr. Thomas Kittredge of Salem was mutually agreed upon as an impartial physician, and was accepted by the arbitrators as such, and on July 19 Tremblay presented himself for examination to Dr. Kittredge, whose report follows:—

I have to-day examined, at my office, Odile Tremblay, as requested by you in letter of July 8, 1913. History of accident: slipped down in a sitting posture, three stairs, onto a concrete floor at Woodbury Shoe Company shop, on Dec. 20, 1912; picked up and laid on pile of leather, not unconscious; lay one-half hour, then walked with assistance of two men to a hack and was carried home; went to bed and was attended by Dr. Stickney for one week; went to work at end of fifteen days, worked two days and was at home rest of week; worked two days the next week; worked irregularly for next several weeks; went to work finally on June 18, 1913, and has worked ever since in a stock room. He states to me that he has recovered from his fall, except that he still has pain in both sides over hips, which is increased by stooping and by turning in bed. He states that he can walk as well as before his fall. Present condition: has normal pulse, tongue clear, appetite good, temperature normal; bowels move every day and kidneys act well; sleeps fairly well but has difficulty in turning in bed; pupils equal and respond equally to light; tongue is protruded in a straight line; has no headache or other discomfort except pain in sides, spoken of above. He has a peculiar gait, having incomplete control of his legs, which has existed a good many years. My opinion is that he has wholly recovered from his fall. I can find nothing to account for the pain in his sides and cannot see the connection between this and his fall. It seems to me that this pain may be related to his condition of partial paralysis of the limbs rather than to his fall.

The arbitrators find that as the result of an injury sustained in the course of his employment, on Dec. 20, 1912, Odile Tremblay is entitled to reasonable hospital and medical services for the two weeks following the injury and to disability compensation for all the time lost from December 20 to April 8, which the time cards of the Woodbury Shoe Company show is a total of twenty-one days, including the fifteen days lost time immediately following the injury. Tremblay is therefore entitled to disability compensation for seven days at one-half of his average weekly wage of \$13, or \$6.50.

The arbitrators find as a fact that Tremblay's unemployment after April 8 was due to lack of work and not to any disability resulting from the injury on December 20, and that all disability from the injury on December 20 had ceased before April 8, 1913, and he is entitled to no compensation for this injury after that date.

EDW. F. MCSWEENEY.

CHARLES D. C. MOORE.

CASE No. 300.

SARAH GANLEY, WIDOW OF THOMAS GANLEY, *Employee*.

AMERICAN AGRICULTURAL CHEMICAL WORKS (BRADLEY FERTILIZER COMPANY), *Employer*.

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., *Insurer*.

WIDOW OF EMPLOYEE WHO WAS FATALLY INJURED AFTER HAVING MADE AN UNSUCCESSFUL APPLICATION FOR WORK NOT ENTITLED TO COMPENSATION.

The evidence showed that the employee, a longshoreman, had finished his work for the subscriber at 7 o'clock on the night before the fatal injury occurred. He made an unsuccessful application for work the next day, and while crossing the railroad tracks was killed by a passing train.

Held, that this was not an injury arising out of and in the course of the employment and that the widow was not entitled to compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Sarah Ganley, widow of Thomas Ganley, v. Employers' Liability Assurance Corporation, Ltd., this being case No. 300 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of Edward F. McSweeney, chairman, representing the Industrial Accident Board; James R. Flanagan, Esq., 17 Milk Street, Boston, Mass., representing the widow of the deceased employee; and John G. Brackett, Esq., 89 State Street, Boston, Mass., representing the insurer, heard the parties and their witnesses in

the Hearing Room of the Industrial Accident Board, Pemberton Building, Boston, Mass., on Tuesday, July 1, 1913, at 10 A.M., and on Friday, July 18, 1913, at 10 A.M.

Thomas Ganley, a longshoreman, while riding on a freight car in Charlestown, on March 21, 1913, fell between two cars. One of his legs was severed, and he was sent to the Relief Hospital, dying the same afternoon as a result of this accident.

Ganley had been working for the American Agricultural Chemical Company (The Bradley Fertilizer Works), office at 92 State Street, Boston, Mass., the day before the accident.

The claim was made by Ganley's widow that he was injured while in the course of his employment. The insurer denied this claim, and said that his employment with the American Agricultural Chemical Works had terminated at 7 P.M. the day before the injury, and that therefore his death was not due to and did not arise out of his employment as a longshoreman for the American Agricultural Chemical Works.

The only evidence offered to substantiate the claim that Ganley was injured while in the course of his employment was that given by his wife, — that she put up his lunch for him when he went out that morning. Because of this she supposed that he was going to work. Mr. Bannard Leaf, the foreman for whom Ganley worked on March 19 to 20, and the timekeeper on the job, testified that the job on which Ganley was working had been concluded at 7 o'clock the night before. Mr. George F. Jewett, the crossing-tender of the Boston and Maine Railroad, who witnessed the accident to Ganley, testified that he knew him by sight and had seen him that morning about 9 o'clock standing about twenty feet from him, leaning against an electric light pole. Ganley remained in this position about an hour, and then started east from the crossing in the direction of the terminal warehouses. The next time that Mr. Jewett saw him was when Ganley was on the ground beside the train, with his leg crushed off, and he remained with him until he was taken to the hospital.

From all the evidence the arbitrators find that Ganley was not, as a matter of fact, on March 21 in the employment of the American Agricultural Chemical Works. The arbitrators find that Ganley was employed by the American Agricultural Chem-

ical Works as longshoreman on a job which was finished on the night of March 20, 1913, at 7 o'clock. On the morning of March 21 Ganley's wife put up his lunch, and he went out seeking work; he applied for work to the American Agricultural Chemical Company, which he did not obtain; and at the time he was killed he was not employed by the American Agricultural Chemical Company, and therefore his death did not arise out of and in the course of his employment.

EDW. F. MCSWEENEY.

JAMES R. FLANAGAN.

JOHN G. BRACKETT.

CASE No. 314.

DANIEL DONOVAN, *Employee*.

JOSEPH MCGREEVEY, *Employer*.

ROYAL INDEMNITY COMPANY, *Insurer*.

SUPREME JUDICIAL COURT AFFIRMS RIGHT OF BOARD TO DRAW INFERENCE THAT A PERSONAL INJURY TO AN EMPLOYEE WHO WAS TRANSPORTED HOME AT END OF DAY'S WORK AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT. SUCH TRANSPORTATION INCIDENTAL TO AND THEREFORE A COLLATERAL PART OF THE CONTRACT OF EMPLOYMENT.

It was the custom of the employee, with the knowledge and consent of his employer, to ride to and from work in a wagon furnished by his employer, the wagon meeting him and other employees on the street, and notification of the absence of any of the employees being given at the beginning of the day's work. The wagon was at the service of any of the employees at the end of the day if they cared to ride back to the barn. The employee received the injury which incapacitated him while riding home at the end of the day's work.

Held, that the employee was not entitled to compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board, revising the decision of the committee of arbitration, finds that the transportation of the employee was incidental to and therefore a collateral part of the contract of employment, and awards compensation.

Appealed to Supreme Judicial Court.

Decision. — The Supreme Judicial Court affirms the findings of the Industrial Accident Board.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Daniel Donovan v. Royal Indemnity Company, this being case No. 314 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of James B. Carroll of the Industrial Accident Board, chairman, Christopher D. A. Hourin, representing the employee, and Robert W. Hill, representing the insurer, heard the parties and their witnesses at the Hearing Room of the Industrial Accident Board Tuesday, July 8, 1913, at 11 A.M., and Wednesday, July 9, 1913, at 1.45 P.M.

Daniel Donovan, the plaintiff, was injured Jan. 10, 1913, while riding home on a wagon belonging to Joseph McGreevey, between 5 and 6 o'clock in the evening. His nose was cut, he received wounds on both knees, and his right hip and lower part of his back were injured. The only question for decision was whether or not the injury arose out of and in the course of his employment.

Daniel Donovan testified substantially as follows: he sometimes went to work at 7.30 and sometimes at 8 o'clock in the morning, according to the distance of the place of employment. He always went to work on the team and took it at the barn. On the 10th of January he quit just a little before 5 o'clock in the evening. The teamster only took care of the horses and the men had to look after the tools. Some nights the helpers would go to the barn and put away the tools; other nights would leave the team before it reached the barn. He was sitting on the team beside the driver when something was pulled from under him, and he was thrown from the team. He went to the City Hospital and was there four days, and then was taken home and treated by Dr. Connor since. He would not say he worked an eight-hour day, because sometimes it was 6.30 P.M. before he got home, and he was paid \$2 a day regardless of the length. If any of the tools were missing the helpers would be held responsible; that is the reason they sometimes went back to the barn in the evening in order to put them away. He always took some tools home with him, and as his

clothes were dirty, being engaged in cleaning catch basins, the conductor would not let him on the car, so he would have to ride on the team.

Dr. Allard, Warren Chambers, Boston, examined Donovan, and testified substantially as follows: the employee was somewhat prematurely old. He had always been well excepting about ten years ago, when he injured one of his ankles. The only objective evidence of the injury was a plaster on back and hip which had been on a long time and which he removed. He did not doubt that the injured man's back was slightly lame. There is nothing the matter with his nose just now. He has nursed his back so long that it has become a sort of mental fixation. He would be much better off to begin light work at once. How soon he would be able to return to his old work would depend on his relinquishing his mental impression. If he would stop stimulants he would be much better off, as it does prolong injuries.

The committee of arbitration finds on the evidence that Daniel Donovan, at the time he was injured, was riding on the wagon belonging to his employer; that his day's work had ended when he left his work on the sewer; and that he was under no obligation to ride on the wagon, and was engaged in no business connected with his employment or the trade of his employer. His time was his own. His use of the wagon was merely permissive, his employer permitting him to ride or not thereon, as the employee saw fit. While in the majority of instances he rode in the wagon from the barn to his place of work in the morning, in returning from his work it was not his uniform practice to so ride. He was free to do so or not at his election. At the time of his injury he was under no duty to his employer. The committee therefore finds that the injury did not arise out of and in the course of his employment, and that he is not entitled to compensation under the Workmen's Compensation Act. (*Davies v. Rhymney Iron Company (Limited)*, 16 T. L. R. 329; *Minton-Senhouse Workmen's Compensation Cases*, Vol. 2, p. 22; *Dickinson v. West End Street Railway*, 177 Mass. 365; *Gouch v. Citizen Railway Company*, 202 Mass. 252.)

JAMES B. CARROLL.

ROBERT W. HILL.

Christopher D. A. Hourin dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, Pemberton Building, Boston, Mass., Thursday, Sept. 11, 1913, at 2 P.M., and Thursday, Oct. 9, 1913, at 10 A.M., and, revising the report of the committee of arbitration, finds as follows:—

The Board finds, upon all the evidence, that Daniel Donovan, the employee, received a personal injury while riding home on a catch-basin wagon on the afternoon of Saturday, Jan. 10, 1913, his transportation on said wagon being incidental to his employment and therefore arising out of and in the course of said employment.

The said employee had been engaged in cleaning out catch basins in and about Quincy Street, Dorchester, and it had been the employee's custom, in common with other employees, with the knowledge and consent of his employer, to ride to and from the vicinity of the catch basins in a wagon furnished by said employer, the wagon meeting the employees on the street and the employer being notified if any employee failed to report for work at the beginning of the day. The wagon was at the service of the employees at the close of the day's work, and they might ride back to the barn in it if they wished. At the time of the injury the employee, the said Donovan, lived at 1519 Tremont Street, Roxbury, at least two miles from Quincy Street, Dorchester, where the catch basin was located, and it was in evidence that he wore long rubber boots, which were furnished by his employer and, on account of the objectionable condition of his clothing after a day in the catch basin, he was not a welcome passenger on the street cars, so that he must ride on the catch-basin wagon or walk home.

The medical evidence shows that the employee will be totally incapacitated, on account of his injury, until Dec. 9, 1913, at which time all incapacity for work, due to the injury, will cease, and the Board so finds.

The Board further finds that the average weekly wages of the employee were \$12, and that he is entitled to the sum of \$25 for medical services furnished during the first two weeks after the injury, and to compensation on account of total incapacity

for work from Jan. 25, 1913, to Dec. 8, 1913, inclusive, a period of forty-five and three-sevenths weeks, at \$6 a week; that is, to the payment of \$272.57, making a total payment due the employee in all of \$297.57.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

Decree of Supreme Judicial Court on Appeal.

SHELDON, J. The contest here is between Donovan, an employee of one McGreevey, and an insurance company which had insured McGreevey under the provisions of St. 1911, chapter 751, Part V., section 3, as amended by St. 1912, chapter 571, section 17. The point in dispute is whether Donovan's injury arose out of and in the course of his employment, within the meaning of Part II., section 1 of the act of 1911 above cited. (See McNichol's Case, 215 Mass. 497.) This must be decided upon the facts found by the Industrial Accident Board in its review of the report of the arbitration committee. (St. 1911, c. 751, Part IV., § 5, *et seq.*, as amended by St. 1912, c. 571, § 8, *et seq.*)

Donovan was employed by McGreevey in cleaning out catch basins at a place about 2 miles from his home. It had been and was his custom, in common with other employees and with the knowledge and consent of his employer, to ride to and from the vicinity of the catch basins in a wagon furnished by his employer, the wagon meeting the employees on the street, and the employer being notified if any of the employees failed to report for work at the beginning of the day. The wagon was at the service of the employees at the end of the day, and they might ride in it back to the employer's barn if they wished. Donovan was injured while so riding in this wagon at the end of his day's work, and the Board has found that his transportation on the wagon was "incidental to his employment," and "therefore" arose "out of and in the course of said employment." The language of this last finding is a little obscure;

but we treat it as both counsel and also the Superior Court have treated it, as being an inference that Donovan's injury arose out of and in the course of his employment, drawn from the other facts stated, including the fact that the transportation was "incidental to his employment." The question to be decided is, therefore, whether this inference can be drawn from those facts; for the facts themselves cannot be inquired into. (St. 1912, c. 571, § 14.)

There have been several decisions in England as to when and how far an employee can be said to have been in the employ of his master while traveling to and from his work in a vehicle or means of conveyance provided by the latter, and how far injuries received in such a conveyance can be said to have arisen out of and in the course of the employment. Many of these decisions have been cited and discussed by Professor Bohlen, in 25 Harvard Law Review, 401, *et seq.* From his discussion and the cases referred to by him, and from the later decisions of the English courts, the rule has been established as we consider in accordance with sound reason, that the employer's liability in such cases depends upon whether the conveyance has been provided by him, after the real beginning of the employment, in compliance with one of the implied or express terms of the contract of employment, for the mere use of the employees, and is one which the employees are required, or as a matter of right are permitted, to use by virtue of that contract. (See *Davies v. Rhymney Iron Co.*, 16 Times Law Rep. 329; *Holmes v. Great Northern Railway* (1900), 2 Q. B. 409; *Whitbread v. Arnold*, 99 L. T. 105; *Cremine v. Gest, Keen & Nettlefolds* (1908), 1 K. B. 469; *Gane v. Norton Hill Colliery Co.* (1909), 2 K. B. 439; *Hoskins v. J. Lancaster*, 3 Butterworth, Workmen's Compensation Cases, 476; *Parker v. Pout*, 105 L. T. 493; *Walters v. Staveley Coal & Iron Co.*, 105 L. T. 119, and 4 Butterworth, Workmen's Compensation Cases, 89 and 303; *Greene v. Shaw* (1912), 2 Ir. 430, and 5 Butterworth, Workmen's Compensation Cases, 530; *Mole v. Wadworth*, 6 Butterworth, Workmen's Compensation Cases, 128; *Edwards v. Wingham Agricultural Implements Co.* (1913), 3 K. B. 596, and 5 Butterworth, Workmen's Compensation

Cases, 511; Walton v. Tredegar Iron & Coal Co., 6 Butterworth, Workmen's Compensation Cases, 592.)

The finding of the Industrial Accident Board that Donovan's transportation was "incidental to his employment" fairly means, in the connection in which it was used, that it was one of the incidents of his employment; that it was an accessory, collateral or subsidiary part of his contract of employment; something added to the principal part of that contract as a minor, but none the less a real feature or detail of the contract. Whatever has been uniformly done in the execution of such a contract by both of the parties to it well may be regarded as having been adopted by them as one of its terms. Especially is this so where none of the provisions of the contract have been shown by either party, but everything is left to be inferred from their conduct. That was the reasoning of this court in such cases as Gilshannon v. Stony Brook Railroad, 10 Cush. 228, 231; McGuirk v. Shattuck, 160 Mass. 45, 47; Boyle v. Columbian Fire Proofing Co., 182 Mass. 93, 98; Kilduff v. Boston Elevated Railway, 195 Mass. 305, 307; and Feneff v. Boston & Maine Railroad, 196 Mass. 595, 597.

Accordingly, we are of opinion that the Industrial Accident Board had the right to draw the inference that Donovan's injury arose out of and in consequence of his employment.

Under our own decisions, Donovan at the time of his injury was in the employ of McGreevey, and was a fellow servant with the driver of the wagon. (O'Brien v. Boston & Albany Railroad, 138 Mass. 387. See also the cases last above cited.) It is not easy to suppose that the Legislature intended that one who was under the disabilities of a servant should be excluded arbitrarily from the benefits which it undertook to give to all employees. The provisions of the act are to be construed broadly rather than narrowly. (Coakley's Case, 216 Mass. 71, 73.)

The decree of the Superior Court must be affirmed; and it is

So ordered.

CASE No. 316.

MIKE KESLER (real name NICOLA D. ZUBENCO), *Employee*.
FORE RIVER SHIPBUILDING COMPANY, *Employer*.

MASSACHUSETTS EMPLOYEES INSURANCE ASSOCIATION, *Insurer*.

INCAPACITY FOR WORK DUE TO INJURY TO LEG WEAKENED
BY PREVIOUS INJURY. COMPENSATION AWARDED.

The employee fell and broke his leg while performing his usual work, and it became necessary to amputate it. The insurer refused to pay compensation on the ground that the leg was in such a weakened condition, due to a previous operation, that any slight jar would cause a fracture. The medical evidence showed that the fracture was due to a fall arising out of and in the course of the employment, and that the injured leg was "possibly weaker" than the other leg prior to the injury.

Held, that the employee was entitled to compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Mike Kesler (real name Nicola D. Zubenco) *v.* Massachusetts Employees Insurance Association, this being case No. 316 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Edward F. McSweeney, chairman, representing the Industrial Accident Board, James T. Cassidy, Esq., Pemberton Building, Boston, Mass., representing the employee, and Arthur L. Pattee, Esq., of 6 Beacon Street, Boston, Mass., representing the insurer, heard the parties and their witnesses in the Hearing Room of the Industrial Accident Board, 201 Pemberton Building, Boston, Mass., on Thursday, July 17, 1913, at 10 A.M.

Mike Kesler (his real name being Nicola D. Zubenco), employed by the Fore River Shipbuilding Company, Quincy, Mass. (who are insured in the Massachusetts Employees Insurance Association), as a reamer in the iron-workers' department, at an average weekly wage of \$10.33, at 3 o'clock on Thursday, Jan. 2, 1913, during working hours, tripped over an air or steam hose on the deck of a vessel on which he was

working, and broke his leg; some months subsequently the leg was amputated. The insurance company admit the facts as to the employment and that Zubenco's leg was broken at the time stated, but claim that, due to a former injury to Zubenco's leg, which had been operated on some ten years ago, this leg was in such a condition that with any slight jar Zubenco would have suffered a fracture, and that the breaking down of the old injury, due to the prior disease, was only a matter of time, and consequently this injury did not arise out of Zubenco's employment.

After listening to the testimony of Dr. William H. Blanchard, the physician employed by the Fore River Shipbuilding Company, in charge of the hospital at the plant, and Dr. Daniel A. Bruce, visiting surgeon at the Quincy Hospital, the arbitrators find that while it is true, as alleged by the insurer, that Zubenco had suffered from an injury to the bone of the leg at some former period, and that this bone was possibly weaker at this point than the similar bone in the other leg, the breaking of this leg was due to a fall sustained by Zubenco while at his employment. The arbitrators find as a fact that the injury to Zubenco, which resulted in the amputation of his leg, was due to an injury arising out of and in the course of his employment, and he is therefore entitled, under paragraph (b) of section 11, of Part II., for the loss by severance of his right foot above the ankle, to additional payment of one-half of his weekly wages, or \$5.17 per week, for a period of fifty weeks from the date of the injury, amounting to \$258.50.

The arbitrators find that as a result of this injury Zubenco has been incapacitated for doing any labor since Jan. 2, 1913, the date of the injury, and in addition to reasonable hospital and medical services for the first two weeks after the injury he is entitled to one-half of his average weekly wages, or \$5.17 per week, from the fifteenth day after the accident for an indeterminate period.

EDW. F. MCSWEENEY.

JAMES T. CASSIDY.

A. L. PATTEE.

CASE No. 317.

EDWIN H. JOHNSON, *Employee.*

NORTON COMPANY, *Employer.*

CASUALTY COMPANY OF AMERICA, *Insurer.*

**EMPLOYEE NOT ENTITLED TO COMPENSATION FOR TYPHOID
FEVER WHICH HAS NO CAUSAL RELATION WITH THE INJURY.**

The employee received a personal injury by reason of the spraining of his left wrist and the dislocation of the middle finger of his left hand. Twelve days later he was taken to a hospital, suffering from typhoid fever. He claimed compensation for the period during which typhoid fever incapacitated him.

Held, that there was no causal relation between the injury and the disease.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Edwin H. Johnson v. Casualty Company of America, this being case No. 317 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of James B. Carroll, chairman, Fred W. Cronin for the employee, and John C. Mahoney for the insurer, heard the parties and their witnesses at City Hall, Worcester, Mass., Monday, July 28, 1913, at 10 A.M.

The employee was represented by Victor E. Runo, Esq., and the insurance company by Frank F. Dresser, Esq.

Edwin H. Johnson of Holden, Mass., employed by the Norton Company of Worcester, Mass., while putting up a spout for rolls, was injured on Aug. 5, 1912, by being thrown to the floor, falling on his hands and spraining his left wrist and dislocating the middle finger of the left hand.

It was not questioned that the employee was injured substantially as stated by him, and it was agreed that his average weekly wages were \$15. About two weeks after the injury he was taken to the hospital, where he was found to be afflicted with typhoid fever. He remained in the hospital up to Oct. 17, 1912. He returned to work December 23. It was the contention of the insurance company that within two weeks

after the injury the disability caused by the injury had been removed, and he was then able to go to work, and that his incapacity resulted entirely from the typhoid fever.

The employee testified in substance as follows: that on the 5th of August he was injured, and as a result of his injury his hand was put in splints and remained in splints until he went to the hospital on the 17th of August; that during his time in the hospital he suffered because of the trouble with his finger and wrist; and that for some time after he was discharged from the hospital he continued to suffer on account of it.

Dr. W. I. Clark, surgeon for the Norton Company, testified in substance as follows, after reading the record of the Worcester City Hospital, which shows that Johnson was suffering from typhoid fever, lobar pneumonia and rheumatic fever: that the middle finger of his left hand was dislocated at the second joint; that the finger was slightly swollen, but in good condition; that there was no evidence of fracture of bones about the wrist; that he was suffering a good deal of pain at the time; and that he continued to dress the hand up to August 10, when he last saw him. In his opinion Johnson should have lost ten days or two weeks, and the injury could not have caused the typhoid fever. He did not believe that the hand was sore in December, and that there were any effects of the injury then present.

Dr. F. H. Washburn of Holden testified that he saw the injured man August 11 at his office; that the thing that was then bothering Mr. Johnson was that he was feeling generally in poor condition; that his head ached, and there was general malaise.

The committee finds, on the evidence submitted, that Edwin H. Johnson was injured in the course of his employment on Aug. 5, 1912; that, although he was taken to the hospital the 17th of August, afflicted with typhoid fever, in the opinion of the committee there was no connection between the typhoid fever and the injury, said injury being entirely independent of it; that on account of his injury he was incapacitated for the period of six weeks, from Aug. 5 to Sept. 17, 1912; and that he is entitled to compensation for four weeks, at the

rate of \$7.50 per week, being half his average weekly wages, amounting to \$30, and to medical attention within the first two weeks after the injury, to the amount of \$5.50, or a total of \$35.50.

JAMES B. CARROLL.
JOHN C. MAHONEY.
FRED W. CRONIN.

CASE No. 326.

STUART D. MUIR, *Employee*.

W. A. WOOD COMPANY, *Employer*.

OCEAN ACCIDENT AND GUARANTEE CORPORATION, LTD.,
Insurer.

TRAVELING SALESMAN NOT ENTITLED TO COMPENSATION FOR INCAPACITY FOR WORK DUE TO AN INJURY RECEIVED WHILE NOT ENGAGED IN THE PERFORMANCE OF WORK FOR HIS EMPLOYER. COMMITTEE ALSO RULES THAT HAVING ELECTED TO PROCEED AT COMMON LAW HE HAS NO RIGHTS UNDER THE WORKMEN'S COMPENSATION ACT.

The employee, a traveling salesman, was a passenger on a Boston Elevated car on the day of the injury, and intended to meet a customer at a certain point. He abandoned this intention, however, and decided to go home. After passing the point where he at first intended to leave the car and meet the customer, and before he arrived home, he was injured. Suit was first brought against the Boston Elevated Railway Company and a decision filed against the claimant. While the case was pending, on exceptions, the employee claimed compensation under the statute. His expenses, from the time of leaving home until he returned thereto, were paid by his employer.

Held, that he was not entitled to compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Stuart D. Muir v. Ocean Accident and Guarantee Corporation, Ltd., this being case No. 326 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of James B. Carroll, chairman, W. H. Lewis for the employee, and Charles E.

Lawrence for the insurer, heard the parties and their witnesses in the Hearing Room of the Industrial Accident Board, Pemberton Building, Boston, Mass., on Wednesday, July 16, 1913, at 11 A.M. The insurance company was represented by James T. Connolly, Esq.

Stuart D. Muir was a traveling salesman in the employ of the W. A. Woods Company, receiving a weekly wage of \$20. On Sept. 20, 1912, while a passenger on a car of the Boston Elevated Railway Company, he was injured. On that date in his employment as a traveling salesman he went to Lynn, returning on the Narrow Gauge Boston, Revere Beach & Lynn Railroad, and reporting to the office of W. A. Wood Company. He then became a passenger on a car of the Boston Elevated Railroad, intending to meet a customer at Upham's Corner. He did not stop at Upham's Corner, and abandoned the idea of seeing the customer, remaining a passenger on the car, intending to leave the car at his home, some distance beyond Upham's Corner, his home being on Howe Street, Dorchester. After passing Upham's Corner, before arriving at his home, he was injured and was incapacitated for fourteen weeks.

Subsequently he brought suit against the Boston Elevated Railway Company in the Superior Court, county of Suffolk. The case was tried on its merits, and at the close of the evidence the trial judge directed a verdict for the defense. The case is now pending on exceptions, the time for filing exceptions having been extended to Aug. 18, 1913.

Mr. Muir's car fare to his home was paid by his employer. In other words, his expenses were paid from the time of his leaving home until he returned thereto. One of the questions is whether the injury arose out of and in the course of his employment.

We find that at the time he met his injury he was on his own business, his time was his own, and he was not in the employ of the W. A. Wood Company; and we rule that the injury did not arise out of and in the course of his employment. We also rule that having elected to proceed in the Superior Court to recover damages against the Boston Elevated Rail-

way Company while the case is still pending on exceptions, he is not entitled to compensation because of section 15, Part III. of the Workmen's Compensation Act.

JAMES B. CARROLL.
CHARLES E. LAWRENCE.
WAYLAND H. LEWIS.

CASE No. 327.

ELLA M. CURRIE, WIDOW OF JAMES A. CURRIE, *Employee*.
TALBOT COMPANY, *Employer*.
ROYAL INDEMNITY COMPANY, *Insurer*.

DEATH RESULTING FROM PNEUMONIA HAD NO CAUSAL RELATION WITH A PERSONAL INJURY ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT BY REASON OF A PIN-PRICK AND SUBSEQUENT SEPSIS.

The employee received a pin-prick by reason of a scratch from a price-tag at his place of employment on April 2, 1913, and died on May 1, 1913, as the result of an attack of pneumonia, which the claimant alleged to be due to a condition of sepsis which followed said pin-prick.

Held, that there was no causal connection between the pneumonia and the injury. Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Ella M. Currie, widow of James A. Currie, v. Royal Indemnity Company, this being case No. 327 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Edward F. McSweeney of the Industrial Accident Board, chairman, A. Weiscopf of Kneeland Street, Boston, Mass., representing the widow, and Flavel Shurtleff, Esq., of 19 Congress Street, Boston, Mass., representing the insurer, heard the parties and their witnesses at the Hearing Room of the Industrial Accident

Board, Pemberton Building, Boston, on Tuesday, July 29, 1913, and Tuesday, Nov. 4, 1913, at 10 A.M.

The evidence in this case is substantially as follows:—

The first hearing in the case was on Tuesday, July 29, 1913. There were five postponements due to the requests of one or the other of the parties in interest, and the final hearing was held on Tuesday, Nov. 4, 1913, at the Hearing Room of the Industrial Accident Board.

James A. Currie was employed by the Talbot Company at the average weekly wage of \$18. The Talbot Company is insured in the Royal Indemnity Company. On the 29th of March, 1913, there appeared on the back of Currie's right hand a small red spot containing pus. He was treated by his wife, who bandaged his hand, which continued to swell, and he finally went to the Relief Hospital on April 2, and afterwards to the City Hospital, where his hand was treated.

On the 24th of April, 1913, Currie saw Dr. Bartlett, whose testimony will be summarized herein later.

On the 26th of April Currie went home from his work after having had a chill, and pneumonia developed, from which he died on May 1, 1913.

There are two points at issue in this case: first, did the septic poisoning from which Currie suffered from March 29 arise out of and in the course of his employment, and second, was the pneumonia from which he later died a result of this septic poisoning?

In regard to whether the pin-prick and the septic poisoning which followed were due to his employment or otherwise, the manager of the Hanover Street store where Currie worked testified that all he knew was that he came and said to him, "Mr. Dunham, what do you think this is on my hand?" I said, "Why, I should call it a spider bite. How did you do it?" He answered, "Don't know; might have pricked it or might have struck it against the case." I said, "How does it feel?" He answered, "My hand feels kind of numb." So I said, "Why don't you run down to the Emergency and let them see it, and if it is anything serious, you want to attend to it."

The report of the injury, which, under the law, should have

been made within forty-eight hours after its occurrence, was not made by the Talbot Company and signed by Manager Dunham until May 20, twenty days after the man had died. On May 20, the Talbot Company reported that they were unable to say anything about the accident, and had not reported it before because they knew nothing about the accident until they received the notification from the Industrial Accident Board.

While there was room for some doubt as to whether the injury from which Currie suffered came while in the course of his employment or otherwise, the weight of the testimony seems to show that Currie was injured by being pricked or scratched by a price-tag attached to an article of clothing in the Talbot store, and therefore the injury arose out of and in the course of his employment, and the arbitrators so find.

The arbitrators find that the insurer is obligated to pay for the reasonable medical and hospital services for the two weeks after the injury, there being no incapacity from labor resulting directly from the pin-prick.

Regarding the contention that the death from pneumonia was due to the septic poisoning resulting from this pin-prick, which arose out of and in the course of his employment, the evidence is substantially as follows:—

Dr. MacMahon, associated with Dr. Laxton on Newbury Street, Boston, testified he had treated Currie several times during the six months preceding his death for rheumatic troubles and general debility. He was a man in poor health, and struck him as a man who was debilitated and run down, due to his confinement to his employment. He came to Dr. MacMahon's office about once every two or three weeks. In answer to the question as to whether Currie would be an easy subject for pneumonia, he replied that if he got a severe cold on his lungs he might get pneumonia. Dr. MacMahon was asked to produce the records in this case, but stated that he had moved a short while before, and some of his papers became mixed up, but if he could find these records he would produce them.

Dr. Walter O. Bartlett, family physician to the Currie family, testified that Currie came to his office on April 24 and

on April 25, and he found on the back of his right hand a mark where the hand had apparently been lanced; it was red and tender looking. He opened the hand at this point, and serum but no pus came out. Dr. Bartlett bandaged the hand.

Q. Did it look very bad, — look as if it was improving? A. (by Dr. Bartlett). It looked that way. On the whole it struck me on April 24 as improving.

On April 26 Currie went home from the store ill. Dr. Bartlett saw him on the 28th again and found him very sick, with rapid pulse and temperature of about 103°, with a spot on the right lung which he diagnosed as pneumonia. Dr. Bartlett saw him at various times until Currie died on the first of May. When he visited Currie's house on the 29th, Currie's wife called his attention to his right ankle, which was swollen and tender. Dr. Bartlett testified that he was told that this condition of Currie's ankle dated back a week, and in his opinion this indicated a spread of the poison from the old septic wound in the hand. He also found inflammation of the mitral valve, which condition he thought was acute. In Dr. Bartlett's opinion the septic hand was the cause of the pneumonia, and therefore the indirect cause of Currie's death. The death certificate, signed by Dr. Bartlett, states that Currie had died of "lobar pneumonia (double) following septic hand (mitral regurgitation)."

Dr. Albert Ehrenfried, surgeon at the Boston City Hospital, testified that he had treated Currie at the City Hospital, and that so far as his memory, refreshed by the hospital record, goes his injury was a rather uneventful recovery from an apparently slight sepsis. Dr. Ehrenfried would not say that pneumonia was in any way caused by the sepsis, and, if it was, it was a very indirect and remote cause. It would not be fair to assume that the swelling of the right foot indicated that the sepsis from the hand had started up again for some reason or other.

Dr. F. E. Allard, called by the insurer as an expert, testified that it was very improbable that the septic hand, which had apparently recovered, should have any bearing on the pneumonia which later developed and which resulted in death.

The condition of the ankle, which Dr. Bartlett testified was a result of the septic poisoning in the hand, was, in Dr. Allard's opinion, consistent with many other conditions, such as rheumatism, declining health and failing compensation of the heart.

After full consideration of the testimony in the case the arbitrators are of the opinion that the claim that the pneumonia from which James A. Currie died was due to the pin-prick which he sustained on or before March 29, 1913, is not substantiated by a preponderance of the evidence, and find that James A. Currie's death was not due to any injury arising out of and in the course of his employment, and in consequence the Royal Indemnity Company is not liable for any payment in consequence thereof.

EDW. F. MCSWEENEY.

FLAVEL SHURTLEFF.

Augustus Weiscopf dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, Pemberton Building, Boston, Mass., Thursday, Dec. 8, 1913, at 2 P.M., and affirms and adopts the findings of the committee of arbitration.

The Board therefore finds that there was no causal connection between the pneumonia which caused the death of the employee, the said James A. Currie, and the pin-prick which he sustained on or about March 29, 1913, and that the widow, Ella M. Currie, is therefore not entitled to compensation under the statute.

JAMES B. CARROLL.

DUDLEY M. HOLMAN.

DAVID T. DICKINSON.

EDW. F. MCSWEENEY.

JOSEPH A. PARKS.

CASE No. 332.

CARMELO MONTALTO, *Employee.*

STAPLES COAL COMPANY, *Employer.*

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD.,
Insurer.

THE AVERAGE WEEKLY WAGES OF A COAL TRIMMER FOUND
TO BE \$14.

The only question at issue in this case was the average weekly wages of a coal trimmer employed in unloading barges in Boston.

Held, that the employee is entitled to compensation on the basis of an average weekly wage of \$14.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Carmelo Montalto v. Employers' Liability Assurance Corporation, Ltd., this being case No. 332 on the files of the Industrial Accident Board, reports as follows: —

This case was heard at the Board Room of the Industrial Accident Board, Pemberton Building, Boston, Mass., on Monday, July 21, 1913, at 10 A.M., before the following committee of arbitration: James B. Carroll, chairman, Philip A. Hendrick for insurer, and Martin P. Vahey, Esq., for employee.

The employee while at work for the Staples Coal Company as a trimmer was injured in the course of his employment, and was incapacitated in such a way that it is impossible to say how long he will be disabled and incapacitated for work. The only question involved in the case is his average weekly earnings, the employee contending that his pay was 30 cents an hour for regular time and 40 cents an hour for overtime; and that he worked two weeks for the Staples Coal Company and was paid \$3.20 on the day he was hurt.

Mr. Peterson, foreman of coal trimmers, testified that the men would average six days a week working about seven hours a day, and that they did not work overtime except in exceptional cases. At the time when Montalto was injured we were paying 30 cents an hour for regular time and 40 cents an hour

for overtime. Overtime begins after 5 o'clock. We handle three barges in a week. If we had three barges come in a man would average from nineteen to twenty-one hours' work. Then the men look for other work after they are done at our wharf. A man working every day in the week would average from thirty-eight to forty hours a week. These men are taken off the street. It is not steady or skilled work. I consider the average weekly wages of coal trimmers throughout the year are \$9 or \$10 a week.

John Wallace testified in substance: I worked for the National Coal Company before I came to the Staples. My work was in the yard. I worked nine hours steady and my weekly wage was \$13 a week. My work was loading vessels. I worked as a coal trimmer fifteen years ago. The men on barges rarely get a full week's work.

Tom McGowan testified that some weeks men make \$9, \$10 and \$12. I have no idea what the men average as a class.

Mr. Barcini testified in substance: I worked as foreman for the Staples Coal Company. My business was to bring men to work for the company. I brought Mr. Montalto. The lowest wage that a man would earn would be \$13, \$14 or \$15. Mr. Montalto worked for the Metropolitan Coal Company before he did for the Staples. He worked two days and got \$6. I believe that \$16 is the average weekly wage of a coal trimmer. I do not think an Italian would go to work there unless he earned \$15 or \$18 a week, so the average is \$16.

On this evidence, and on investigations made by members of the committee of arbitration, we find that the average weekly wage of a coal trimmer employed in unloading barges in the city of Boston is \$14 a week. By reason of the shortness of the time the employee worked for the Staples Coal Company it is impossible to arrive at an accurate decision as to his average weekly wages in that employment, except by applying the rule in *Gillen v. the Ocean Accident & Guarantee Corporation, Ltd.*

We therefore find that he is entitled to his medical and hospital services for the first two weeks, or fourteen days following the injury; that is, during the first two weeks after June 10. He is entitled to compensation in addition at the

rate of \$7 a week, beginning June 24, to continue during the incapacity of the said employee for work, or until the same shall be ended, diminished or increased, according to the Workmen's Compensation Act.

JAMES B. CARROLL.
MARTIN P. VAHEY.

Philip A. Hendrick dissents.

CASE No. 338.

EPHRAIM D. EMERSON, *Employee*.

PRATT & FORREST COMPANY, *Employer*.

MASSACHUSETTS EMPLOYEES INSURANCE ASSOCIATION, *Insurer*.

DEPUTY SURVEYOR OF LUMBER A PUBLIC OFFICIAL AND NOT
AN EMPLOYEE.

The claimant, a deputy surveyor, appointed by the surveyor-general, received a personal injury while surveying lumber for the subscriber and claimed compensation as an "employee." The evidence showed that the deputy surveyor was a public official; that he could not survey lumber under the law "for any person by whom he is employed;" that his duties were fixed by statute; that he was under the control, instruction and direction of the surveyor-general; and that his salary was fixed by law and was in the form of fees covering the service rendered.

Held, that the claimant was not an "employee."

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Ephraim D. Emerson v. Massachusetts Employees Insurance Association, this being case No. 338 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of Joseph A. Parks, representing the Industrial Accident Board, chairman, Dwight Powers of Boston, Mass., representing the employee, being substituted for C. H. Balkam by agreement when it developed that the latter expected to be called as a witness, and Otis W. Richardson of Boston, Mass., representing the insurer, heard the parties and their witnesses at the Hearing Room of the

Industrial Accident Board, Pemberton Building, Boston, Mass., Thursday, Sept. 4, 1913, at 2 P.M.

The question at issue was solely whether the claimant, Ephraim D. Emerson, was an employee of the Pratt & Forrest Company at the time of the injury or a public official. The insurer claimed that he was performing duties for the State as a deputy surveyor of lumber, and that he was not an employee within the meaning of the word as used in the Workmen's Compensation Act. The employee claimed compensation, stating that he came within the meaning of the word as used in the statute. It was agreed that he received an injury in the course of and arising out of his employment as a deputy surveyor of lumber; that he received the injury which incapacitated him on June 5, 1913; and that his incapacity for work ended on Aug. 3, 1913.

Ephraim D. Emerson testified that he was sent by the surveyor-general to the Pratt & Forrest Company to survey a car of hard pine lumber, there being a dispute between the buyer and seller as to the quantity and quality, and his certificate being accepted as final between the parties. His wages were \$6 a day and expenses outside of Boston. He reported at the office of the lumber company at 11.45 o'clock, but was told not to begin work until 1 o'clock. The foreman of the company gave him his orders not to begin until 1 o'clock, and the usual custom is for the dealer, or his agent, to give him a schedule of the lumber he wishes surveyed, or tallied, and he always regarded himself as subject to these orders. He was appointed a deputy surveyor by the surveyor-general of the State. A report of his work is filed with the surveyor-general.

C. H. Balkam, who frequently employed Emerson, testified that he usually calls him on the telephone, making arrangements for the work which he is to perform, his employment of Emerson being indirectly reported to the surveyor-general. After giving Emerson his orders, he testified he had no further talk with him, being certain that the work would be properly done and the bill rendered in accordance with the law. His certificate was usually accepted as final, the only person having power to review it being the surveyor-general.

C. Marshall Forrest, of the firm of Pratt & Forrest, testified

that he called in Ephraim D. Emerson for the purpose of surveying a car of lumber which did not look right to him; that his foreman is in charge of the yard and that he would tell the deputy surveyor just what he wanted done. He felt that the deputy surveyor was an expert and that he had no control of him.

The committee finds that Mr. Emerson was appointed a deputy surveyor by the surveyor-general, who in turn was appointed by the government; that "neither the surveyor-general nor any deputy shall survey any lumber in which he has a pecuniary interest, directly or indirectly, nor for any person by whom he is employed;" that he was by statute responsible to the surveyor-general and subject to removal by him and was under bond to him (R. L., ch. 60, §§ 1, 2); that he was sent by the surveyor-general on application to the surveyor-general by the Pratt & Forrest Company for a surveyor (§ 3); that the surveyor-general sent any surveyor he wished and that the applicant could not choose any particular surveyor; that the survey was made under the instruction and direction of the surveyor-general (§§ 2, 3); that the fees were determined by statute (§ 15), part of the fees being paid to the surveyor-general, in case of excess of a certain total to the Commonwealth (§ 15); that the deputy surveyor makes reports to the surveyor-general, who in turn reports to the State (§§ 2, 4, 5), such reports being open to certain city and town officials; that it is expressly provided that the surveyor-general and deputy surveyors shall not survey lumber "for any person by whom he is employed" (§ 2); that either buyer or seller may apply for a survey (§ 8), but in either event the purchaser shall pay the fees (§ 15) and may collect from the seller one-half of the same (§ 15).

The committee of arbitration therefore finds and rules upon all the evidence that Ephraim D. Emerson, the claimant, was not an employee of the Pratt & Forrest Company at the time of his injury, and that he is not entitled to compensation under the provisions of the Workmen's Compensation Act.

JOSEPH A. PARKS.

OTIS WELD RICHARDSON.

DWIGHT POWERS.

CASE No. 340.

ANNIE LEARY, WIDOW OF JOHN J. LEARY, *Employee*.

POST NEWSPAPER COMPANY, *Employer*.

TRAVELERS INSURANCE COMPANY, *Insurer*.

TUBERCULOSIS, NOT LEAD POISONING, CAUSES DEATH OF EMPLOYEE.

The evidence showed that the employee was overcome in the press room of the subscriber on July 19, 1909, and left his place of employment for the purpose of going home. He collapsed on the street and was taken to Grace Hospital. A physician who treated him on several occasions stated that he could find no evidence of anything tubercular in the lung. The City Hospital records and the certificate of death gave tuberculosis as the cause of the death of the employee.

Held, that the employee did not receive a personal injury arising out of and in the course of his employment.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Annie Leary, widow of John J. Leary, v. Travelers Insurance Company, this being case No. 340 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of Edward F. McSweeney of Boston, Mass., chairman, representing the Industrial Accident Board, William E. McGerigle, Esq., 115 Radcliffe Street, Dorchester, Mass., representing the employee, and William C. Prout, Esq., 60 State Street, Boston, Mass., representing the insurer, heard the parties and their witnesses in the Hearing Room of the Industrial Accident Board, Pemberton Building, Boston, Mass., on Tuesday, July 29, 1913, at 2 P.M., and on Friday, Oct. 17, 1913, at 10 A.M.

Annie Leary, widow of John J. Leary, claimed that her husband, John J. Leary, employed by the Post Newspaper Company (insured by Travelers Insurance Company), Washington Street, Boston, Mass., in the press room, was injured by lead poisoning in the course of his work, which became acute on July 19, 1912, when he was overcome in the shop; that he started home and collapsed in the street, and was taken

by two police officers to Grace Hospital. The nature of the injury was claimed to be lead poisoning, taken in through finger nails. Mrs. Leary stated that the signs of lead poisoning which Mr. Leary had were pains in his stomach, a line on his gums, and his teeth discolored.

There was no accident report made as to this injury. The insurance company said: "Regarding this claim, we will say that, as far as we know, there never was an accident; secondly, no report of any accident was made to this office, nor any intimation of an accident."

Dr. William W. Duckering, 2 Warner Street, Dorchester, Mass., stated that he had treated Mr. Leary several times for lead poisoning, one occasion being in October, 1908. Dr. Duckering said he could find no evidence of anything tubercular in the lung. The initial sickness was lead poisoning; the principal one was empyema, from which he died.

The death certificate indicated tuberculosis; the City Hospital records showed a plain case of tuberculosis; L. W. Gorham, pathologist, diagnosed the disease as "mixed effusion. Staphylococcus. Albus predominating." Clinical diagnosis, "pulmonary tuberculosis with empyema."

A second hearing was held Oct. 17, 1913, at 10 A.M., at the Hearing Room of the Industrial Accident Board, Pemberton Building, Boston, Mass.

At the request of the arbitrators a medical opinion in this case on the facts was requested of Dr. F. D. Donoghue, who reported in writing as follows:—

864 BEACON STREET, BOSTON, MASS.,
Oct. 17, 1913.

Industrial Accident Board, R. E. Grandfield, Secretary, Boston, Mass.

DEAR SIR:—Annie Leary, widow of John J. Leary, employee; Post Newspaper Co., employer; Travelers Insurance Co., insurer.

I have carefully read the evidence and the hospital report in the case of Annie Leary, widow of John J. Leary.

The cause of the death in this case appeared to be due to the complications of tuberculosis of the lung, and it is evident from the story that tuberculosis was of long standing, antedating July, 1912.

There is some evidence that the man was suffering from lead poisoning, although the evidence is not conclusive; but assuming that it was chronic lead poisoning, and that the attacks that he had of colic could be attrib-

uted to lead poisoning and to nothing else, I still see no connection between his lead poisoning and the cause of his death. Lead poisoning, when it occurs, is a poisoning by a chemical substance, and does not produce pus. The cause of death, on the other hand, was due to the destructive action of the tubercle bacillus, complicated by a pus-producing organism.

I have also considered the debilitating effect of lead poisoning, having in mind the question of whether or not it might have reduced his vitality so that tuberculosis might have ensued. I find no satisfactory evidence of this, and believe that tuberculosis alone, existing before July, 1912, ran an unchecked course until it caused his death.

Very truly yours,

FRANCIS D. DONOGHUE, M.D.

The arbitrators find that there is nothing in the evidence submitted in this case to justify the claim that this injury arose out of or in the course of John J. Leary's employment, and therefore there is no liability for his death, under the Workmen's Compensation Act, on the Travelers Insurance Company.

EDW. F. MCSWEENEY.

WILLIAM C. PROUT.

WILLIAM E. MCGERIGLE.

CASE No. 350.

MARGARET BUCKLEY, DEPENDENT OF HANNAH BUCKLEY, DECEASED, *Employee*.

L. Q. WHITE SHOE COMPANY, *Employer*.

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, *Insurer*.

WHOLLY DEPENDENT FOR SUPPORT UPON THE EMPLOYEE.

BOARD DECIDES THAT INVALID SISTER WAS WHOLLY DEPENDENT, AND SUPREME JUDICIAL COURT FINDS THAT AS A MATTER OF LAW THIS DECISION IS WITHOUT ERROR.

The claimant had been an invalid for twenty-five years and lived with and was supported by her sister, the fatally injured employee, "everything the said Margaret Buckley received in the way of food, lodging, clothing, medicines, payment of doctors' bills, and contributions of cash coming from her sister, Hannah Buckley," according to the statement of the evidence by the committee of arbitration.

Held, that the claimant was wholly dependent for support.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to Supreme Judicial Court.

Decision. — The Supreme Judicial Court affirms the findings of the Industrial Accident Board.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Hannah Buckley, deceased, by Margaret Buckley, dependent, v. American Mutual Liability Insurance Company, this being case No. 350 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Joseph A. Parks, representing the Industrial Accident Board, chairman, Patrick F. Sheehan of Brockton, representing the employee, and Herbert C. Thorndike of Brockton, representing the insurer, heard the parties and their witnesses at the Aldermanic Chamber, City Hall, Brockton, Mass., Saturday, Oct. 18, 1913, at 9.30 A.M.

E. C. Stone, Esq., appeared for the insurer, and D. D. Sullivan, Esq., for the employee.

The questions at issue were whether the employee died as a result of a personal injury arising out of and in the course of her employment, whether the claimant, Margaret Buckley, was a dependent and the extent of her dependency, and the average weekly wages of the deceased employee.

Hannah Buckley, the deceased employee, while in the course of her employment in the stitching room of the L. Q. White Shoe Company, on April 4, 1913, ran a needle through her finger, causing blood poisoning, from which she died.

The evidence showed that Margaret Buckley, sister of the deceased, was totally dependent upon the deceased employee's earnings at the time of the injury. It was shown that she had been practically an invalid for twenty-five years and had not been able to work during that time, being under medical treatment continually. The three brothers of the deceased, Patrick, James and John, and a sister Helen all paid their board, Hannah Buckley being regarded as the head of the household,

and receiving the payments as such, Patrick paying \$6 per week, James and John each \$5 per week and Helen between \$4 and \$5 per week. Hannah Buckley used the money she received from her brothers and sister to manage the house and paid all the bills, but supported Margaret Buckley out of her own wages, everything the said Margaret Buckley received in the way of food, lodging, clothing, medicines, payment of doctors' bills, and contributions of cash coming to her from her sister Hannah Buckley.

Dr. Goddard of Bridgewater, who attended the deceased at the time of the injury, testified that when he saw her on April 10 last he found the general symptoms of blood poisoning, and a kind of blood poisoning which was very rapid in its development. From the history he received of the patient's having run a needle through her finger six days before, it was undoubtedly caused by the injury, as described.

Mr. W. F. Packard, superintendent of the L. Q. White Shoe Company, testified that Miss Buckley, the deceased, had not been on the job very long, that she was only learning, and that after a while she would have made a great deal more money. She was increasing in efficiency quite rapidly, until at the time of the injury she was earning \$10 per week. This particular job was worth from \$12 to \$16 per week and higher. Some employees made \$18 and \$19 per week at the same work. It took about six months' time for a person to become a quick operator. Miss Buckley had been employed there about five months. As the result of an inquiry made by the insurer during the progress of the case it was found that the average weekly wage of persons "employed in the same grade at the same work by the same employer" was \$14.56.

On all the evidence, the committee finds that the death of Hannah Buckley was caused by a personal injury arising out of and in the course of her employment; that the average weekly wage, as defined in section 2, Part V., of the Workmen's Compensation Act, "where, by reason of the shortness of the time during which the employee has been in the employment of his employer, or the nature or terms of the employment, it is impracticable to compute the average weekly wages, as above defined, regard may be had to the average

weekly amount which, during the twelve months previous to the injury, was being earned by a person in the same grade employed at the same work by the same employer," is \$14.56; and that Margaret Buckley was in fact totally dependent upon the earnings of the deceased at the time of the injury, and is therefore entitled to the payment of compensation at the rate of \$7.28 per week, this being one-half the average weekly wage, to be continued for a period of three hundred weeks from the date of the injury, April 4, 1913.

JOSEPH A. PARKS.

PATRICK F. SHEEHAN.

Herbert C. Thorndike dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, Pemberton Building, Boston, Mass., on Friday, Jan. 1, 1914, at 3.15 P.M., and affirms and adopts the findings of the committee of arbitration.

All the material evidence is stated in the report of the committee of arbitration, no new evidence being introduced at the hearing on review before the Industrial Accident Board.

The evidence shows that the dependent, Margaret Buckley, was wholly dependent for support upon the earnings of the deceased employee, the said Hannah Buckley, at the time of the injury, all the support which she received, food, lodging, clothing, medicines, payment of bills of physicians and contributions of cash, coming to her from the said Hannah Buckley.

As a result of the death of the said employee, the source of her support was taken away from her. The claimant is an invalid, unable to work, requiring constant medical attention and care, and she was in fact wholly dependent upon the earnings of the deceased, the evidence showing that the cost of her support came out of the earnings of the said deceased.

The fact that other members of the family paid board to the deceased employee, the said Hannah Buckley, has no bearing

upon the fact of the total dependency of the claimant, Margaret Buckley, the evidence showing that the cost of food alone was in excess of the amount paid by the brothers and sister for board, the said brothers and sister not contributing anything to the support of the said Margaret Buckley. The said Hannah Buckley was the head of the household and paid all its expenses. (Rintoul v. Dalmeny Oil Co., Lim. (1908), 1 B. W. C. C. 340; New Monckton Collieries, Ltd., v. Keeling, 4 B. W. C. C. 332; Pryce v. Penrikyber Navigation Colliery Co., Ltd., 4 W. C. C. 115; Marsh v. Boden, 7 W. C. C. 110.)

The Industrial Accident Board therefore finds that the claimant, the said Margaret Buckley, was wholly dependent for support at the time of the injury upon the earnings of the said Hannah Buckley, and that there is due her from the insurer, the American Mutual Liability Insurance Company, a weekly payment of \$7.28 for a period of three hundred weeks from the date of the injury, April 4, 1913.

The requests for rulings hereto annexed are refused in so far as they are inconsistent with the findings of the Board. The synopsis of the evidence attached to and made a part of the requests by the insurer, in our opinion adds unnecessarily to the record, the material evidence being stated in the report of the committee of arbitration and the findings and decision of the Industrial Accident Board.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

THE COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK SS. BEFORE THE INDUSTRIAL ACCIDENT BOARD.

MARGARET BUCKLEY, ALLEGED DEPENDENT OF HANNAH BUCKLEY,
Employee.

L. Q. WHITE SHOE COMPANY, *Employer.*

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, *Insurer.*

Insurer's Requests for Rulings on Review.

1. On all the evidence, transcript of which furnished by the Industrial Accident Board is hereto annexed as a part hereof, the said Margaret Buckley was not totally dependent upon the earnings of the deceased employee at the time of the injury.

2. On all the evidence aforesaid, the findings of the arbitration committee cannot be sustained as matter of law.

3. On all the evidence aforesaid, the alleged dependent is not entitled to recover compensation at the rate of \$7.28 per week.

Miss Margaret Buckley testified as follows: that she was the sister of Hannah Buckley; that she has lived in Bridgewater about two years; that her sister Hannah died April 11, 1913; that her sister Hannah worked in the L. Q. White Shoe Company factory prior to her death, and that she was a stitcher; that Hannah received her injury on or about the 4th of April; that her sister Hannah was working when she ran a needle into her finger which later developed into blood poisoning; that when she saw the finger there was a slight cut on it; that she saw the finger every day after that; that she was hurt on Friday night and on Saturday night she had her finger opened and on Sunday morning she was very feverish; that on Sunday morning Hannah went to church, but had to come out early with the pain in her arm, and went home to bed; that that night the fever was very high; that Dr. Warren came and he said he thought she had the grip at first, but still the pain was in her finger, although he thought this pain had nothing to do with her condition until the arm began to swell and turn black; that Dr. Goddard was called and he said it was blood poisoning; that the arm grew worse each day, and on Friday morning she passed away; that her father died ten years ago and her mother four years ago; that after her mother died Hannah took complete charge of the household; that she has not been able to support herself for the last twenty-five years, as she has suffered from asthma and heart trouble and has spent hundreds of dollars on doctors and doctors' bills; that for the last four years she has not earned a cent; that she doctored all the time; that she was not able even to do the housework; that Hannah and Ellen did the housework between them in the morning before going to work and after coming home from work; that Hannah was forty-three years old; that she (Hannah) never had a doctor in her life until this accident; that the house they live in is owned by them; that when the mother died, the house was passed down to her, and at her death it was to go to Hannah, and at Hannah's death it was to go to Hannah's dependents; that the house

is worth about \$2,000, including the land and barn; that Hannah has worked since the mother's death; that Hannah stayed home a week or two after the mother's death, but went back to work in the shoe factory, her employer being Geo. E. Keith, and worked until about a year and a half before her death; that she stayed home about a year, but during this time had to draw from her savings in the bank; that Hannah started to work again the Monday of Thanksgiving week, 1912, in the L. Q. White Shoe factory, and she worked there until her death; that the reason Hannah stayed home that year was to take care of her, as she was very sick; that at the time of her mother's death three brothers lived with them, Patrick, James and John; that Patrick was a shoe maker and worked at the L. Q. White Shoe Company, but she did not know what pay he got; that James worked in different shops as a shoe cutter; that he is thirty years old, and she thought that he made between \$25 and \$30 a week, but perhaps on an average he earned \$17; that Jerry is married, but his wife is dead, and while he does not live with them all the time, he makes it his home, *i.e.*, he lives where he works, but often runs home on Saturday nights and stays over Sunday with them; that John worked for the Adams Express as a freight agent, his wages being about \$12 a week, but he is married now, although he was not at the time of the mother's death; that Patrick paid \$6 for board, James \$5 and John \$5, and Helen, the sister, paid between \$4 and \$5 a week; that Hannah used the money she got from her brothers and sister to run the house and to pay the bills for the house, but supported her out of her own wages; that Hannah always paid for her clothes, medicine, doctor bills, etc., out of her own money; that Dr. Warren, Dr. Whalen, Dr. Dacey, the Hayes doctors, Dr. Callahan, Dr. Stone of Stoughton, Dr. Grange of East Boston, and several doctors in Bridgewater treated her; that she went to the Massachusetts General Hospital and also received medicine from a doctor on asthma in New York; that hundreds of dollars had been spent on her for doctors' bills; that she never saw the doctor's bills paid except when the doctor would come to the house; that Hannah paid all the bills; that she did not handle the money at all; that Hannah always kept

her money in her pocketbook and she had nothing to do with it; that they traded with Henry Sheehan, grocer, but she did not remember how the bills were addressed; that with everything they ordered, a slip would be sent, and when a few would accumulate, her sister Hannah would pay them; that if she was sick Hannah would stay out and look after her; that for the last six months Hannah did not have to stay out because she was able to be around; that she was not able to do anything at all; that the sweeping, washing and ironing was done by a Mrs. Cortland; that she never got anything in the line of money, gifts or anything else from her three brothers and sister Helen; everything she had she got from Hannah.

Helen Buckley made the following statements: that she lives at Bridgewater and is thirty-six years old; that her sister Margaret's health in the last four years has been very poor; that during this period the family consisted of John, James, Patrick, Hannah, Margaret and herself; that she knows that Hannah ran needle through her hand while at work in the L. Q. White Shoe Company; that she did not see the finger until the next day, when there appeared to be just a scratch right through the finger; that on Saturday her sister Hannah was operated upon; that the arm swelled to three times its natural size; that after Drs. Warren and Goddard had held a consultation they came out into the room where she was and Dr. Goddard said that Hannah was a very sick woman; that when they asked him what was the matter, he said blood poisoning; that since her mother's death Margaret has not been capable of working, in fact for the past twenty-five years has not been able to work; that Hannah paid all the bills; that Hannah bought medicine and paid all the doctors' bills for Margaret; that she never contributed anything towards Margaret's support; that she and her brothers both paid board to Hannah; that she supported her little niece, but never contributed a cent towards Margaret; that she earns \$12 per week; that she belongs to four associations; that Jerry only comes home once in a while; that he lives where he works; that Patrick lived with them and paid board and James lived there and paid board to Hannah; that when her mother lived she took care of Margaret, but after her mother's death the

burden fell on Hannah, as she was the oldest and head of the household; that board could not be gotten any place cheaper than what she paid at home, but she preferred to stay at home because if she was sick some one would take care of her; that while she did not give any money towards Margaret's support, she did many things for her, for instance, staying up nights with her when she was sick; that the money Hannah got from her sister and brothers went towards paying the bills for running the house; that their grocer is Henry Sheehan; that he sends up slips with the groceries, and Hannah would pay these when she had a few of them; that in the other stores they paid cash; that she does not know who the slips were made out to, but she thinks they were headed "Miss Buckley;" that the furniture had always been in the house, but she thought that perhaps when the house was left to Margaret that the furniture was also left; that many new things had been added to the house since her mother died; that the piano belonged to her niece; that she bought a new sewing machine and other things; that her brother Jerry's furniture is also there; that she always paid her board to Hannah on Thursday night because that was pay night; that she does not remember seeing her sister Hannah pay any bills, but she knows that they were paid by her; that the expenses amount to more than what is given in for board by the brothers and herself, but that Hannah made up the extra money; that when Hannah did not work she had to draw from the bank; that the household expenses are very heavy; that the meat bill alone is \$6 or \$7 a week; for the milk, \$1.19 a week; \$1 for butter each week; \$5 for gas a month; grocery bill \$10; perhaps about 70 cents a week for fruit; then vegetables had to be bought each week and Margaret's medicine and doctor's bills had to be paid for; that some kind of medicine Margaret gets is 60 cents a week; then she inhales the smoke of some medicine which costs 80 cents a box, and she also used cod liver oil costing 25 cents a bottle; that nine tons of coal were burned last winter; that the reason she knows what it takes to run the house is because she has kept house since her sister Hannah died; that her brothers never did anything for Margaret; that she never heard Hannah ask for more money than

they gave in for their board, nor did she ever hear her say that she thought she was doing too much for Margaret and the others not enough; that all she did for her invalid sister was done willingly; that she never knew of her brothers giving Margaret anything, even in the way of a gift at Christmas or Easter; that the house they live in is insured against fire, and the insurance has been paid but once since the mother died; that her sister Hannah paid it; that Hannah looked out for the taxes; that no repairs had been done on the house since the death of the mother; that when she paid her board she knew that she was not paying for any more than her own board and room, and did not feel that she was helping any of the other members of the family by paying this; that she could not have gotten board anywhere in Bridgewater cheaper than she was getting at home; that the board she got at home was very good.

Dr. Goddard testified as follows: that he practices in Brockton; that he was called to Bridgewater to attend Hannah Buckley; that he was told the story of her accident; that they told him she injured her right middle finger by running a needle into it six days before, and that it did not trouble her much for a day or two, after which time it began to swell; that according to Dr. Warren she had a very high temperature and pulse; that the general symptoms were those of blood poisoning; that he saw Miss Buckley the day before she died, that was Thursday afternoon, April 10; that he had not seen her at all until then; that when he saw her this afternoon she had the appearance of a woman dying from blood poisoning; that he did not sound her heart and go all over her except in a superficial way to see if anything marked presented itself; that some are more likely to succumb quickly to blood poisoning than others; that this kind of blood poisoning is one of the very worst forms; that no cultures were taken, so he cannot say exactly what germ it was, but he feels quite sure that it was the worst kind of a germ; that this germ goes like wild fire; that this kind of blood poisoning is always fatal because at the beginning you could not tell what kind of a germ it is. If at the beginning they knew what it was, they would amputate the arm and save the patient's life, but it is not until it

develops that they know what it is, and it goes so quickly that it is too late to do anything.

Patrick H. Buckley testified as follows: that he lives in Bridgewater and that he is a brother of Margaret, Helen and Hannah Buckley; that his sister Hannah was in good health always, until she received her injury, and worked continually with the exception of the year she stayed at home; that his sister Margaret has been sick for the past twenty-five years; that after his mother died, four years ago, his sister Hannah took charge of the house, and since then he did not have to pay anything towards coal or taxes; that Margaret was supported altogether by her sister Hannah; that Drs. Warren and Whalen attended his sister Margaret; that Margaret had never earned a cent since her mother died; that he never made any repairs on the house the past four years; that he works for the L. Q. White Shoe Company and earns on an average of from \$18 to \$20 a week; that he pays the same amount of board now as he did when his mother lived; that Margaret never asked him for anything, nor did Hannah ask anything for Margaret; that everything went on the same way after his mother's death, and Margaret seemed to be perfectly content with the arrangements; that everything went along smoothly and Hannah never found fault; that Hannah was a stitcher at the L. Q. White Shoe Company.

Mr. Packard testified as follows: that he is a superintendent at the L. Q. White Shoe Company; that Miss Buckley had not been on the job very long; that she was just learning, and after a while she would make a good deal more money; that the job is worth from \$12 to \$16 a week and higher; that some would make \$18 and \$19; that she was increasing quite rapidly; that he could not say how steadily she worked, because some departments lay off for a few days when there is not much work; that after six months' time a person should be a quick operator; that a pretty good operator would earn from \$12 to \$16 a week.

Decree of Supreme Judicial Court on Appeal.

HAMMOND, J. This is an appeal by the insurer from a decree of the Superior Court made in accordance with a decision of the Industrial Accident Board acting under St. 1911, c. 751,

commonly called the Workmen's Compensation Act. The only question raised here by the appellant is whether the evidence justified the finding of the Board that Margaret, at the time of the injury to her sister, was wholly dependent upon Hannah for support.

There is no appeal from the finding of the Board upon a question of fact where there is any evidence to support it; but where, as here, the evidence is all reported, the question whether it is sufficient to support the finding is one of law and may be revised here.

The insurer contends that the finding that Margaret was wholly dependent upon Hannah is not justified by the evidence. We have examined the evidence and cannot say as matter of law that it does not justify the finding. The only part of it that presents any difficulty is that part relating to Margaret's interest in the house in which she and her sisters lived. Curiously enough, while the evidence as to the other circumstances of the family is narrated in considerable detail in the body of the majority report of the committee of arbitration, upon which that report as well as the decision of the Board is based, the matter of the ownership of the house is not mentioned either by the committee or by the Board. It appears only in the transcript of the evidence made for the insurer by the committee, of which transcript the Board says that it "adds unnecessarily to the record, the material evidence being stated in the report of the committee . . . and the findings and decision of the . . . Board."

It appears from this transcript that Margaret testified that the house "is owned by them (Margaret and Hannah); that when the mother died the house was passed down to her (Margaret), and at her death it was to go to Hannah, and at Hannah's death it was to go to Hannah's dependents; that the house is worth about \$2,000, including the land and barn." Helen, a sister, testified that "the furniture had always been in the house, but she thought that perhaps when the house was left to Margaret, . . . the furniture was also left; that many new things had been added to the house since her mother died."

This evidence was very vague and unsatisfactory. No documentary evidence was given so that it could be determined what was the precise nature of Margaret's interest; and in view of

her long-continued illness and invalidism it may be that no reliance was placed either by the committee or by the Board upon her testimony in this respect. Moreover, her statement, if believed, showed at most only a life interest, and no light was thrown upon the condition of the property and the cost of keeping it up as a life tenant was bound to do. And further, it may have seemed to the Board upon the evidence that Margaret was frail and liable at any time to die suddenly. It does not appear whether there was a mortgage upon the house. Indeed, the whole evidence upon the subject seems, as above stated, to have been very unsatisfactory, and the Board well may have concluded that Margaret's interest, even if it was a life estate, was of little if any value for use or for sale, and for that reason practically had no bearing upon the question of her dependency upon Hannah. It cannot be said as matter of law that such a conclusion was erroneous.

Decree affirmed.

CASE No. 374.

MARY A. HAYDEN, ADMINISTRATRIX AND DEPENDENT OF
JAMES F. HAYDEN, DECEASED, *Employee.*

BAY STATE STREET RAILWAY COMPANY, *Employer.*

MASSACHUSETTS EMPLOYEES INSURANCE ASSOCIATION, *Insurer.*

**VALUE OF BOARD NOT TO BE DEDUCTED IN COMPUTING COM-
PENSATION DUE PARTIAL DEPENDENTS.**

The employee contributed the sum of \$12.50 to the dependents, \$10 in cash to his mother, and \$2.50 in groceries, weekly, the sole question at issue being whether the said dependents were entitled to the payment of a weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased, or whether from the amount so contributed the value of his board should be deducted.

Held, that the value of board should not be deducted in computing the compensation due the partial dependents.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Mary A.

Hayden, administratrix and dependent of James F. Hayden, deceased employee, *v.* Massachusetts Employees Insurance Association, this being case No. 374 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of David T. Dickinson of Cambridge, representing the Industrial Accident Board, chairman, Benjamin A. Lockhart of Boston, Mass., representing the employee, and Arthur Bancroft of Boston, Mass., representing the insurer, heard the parties and their witnesses at the Hearing Room, Pemberton Building, Boston, Mass., Thursday, Aug. 14, 1913, at 10.15 A.M.

It was agreed that James F. Hayden, the deceased employee, twenty-four years of age, and residing at 457 Linden Street, Fall River, Mass., was killed at his place of employment in the substation of the Bay State Street Railway Company in that city on the morning of Monday, Jan. 6, 1913, at about 3.55 o'clock. He was an electrician, working nights, and death was caused, in all probability, by an electric shock. The deceased was unmarried and resided with his father and mother. Three brothers, Lawrence E., Jr., William H. and Francis, and two sisters, Margaret M. and Genevieve, lived at home. It was agreed that the injury arose out of and in the course of his employment, and that his average weekly wages were \$17.66.

The parties also agreed that the deceased contributed the sum of \$12.50 to the dependents, \$10 in cash to his mother, Mary A. Hayden, and \$2.50 in groceries, weekly, the sole question at issue being whether the dependents were entitled to the payment to the administrator, for their benefit, of a weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased, or whether from the amount so contributed the value of his board, which was agreed to be \$4 weekly, should be deducted and the amount actually contributed by him be considered as \$8.50, this being the sum contributed, less the agreed value of his board. This question is now before the Supreme Judicial Court, the findings and decision of the Industrial Accident Board in the case of Daniel Murphy of Lancaster, Mass.,

partial dependent of Walter Murphy of Lancaster, Mass., *v.* American Mutual Liability Insurance Company having been taken up on appeal by the insurer, the sole question at issue being whether there shall be deducted from the amount contributed by the employee to those partially dependent upon him the cost or value of his board in arriving at the amount due the said partial dependents under the act.

It was agreed that the insurer, the Massachusetts Employees Insurance Association, would pay to Mary A. Hayden, the administrator, the sum of \$6.25 weekly for a period of three hundred weeks from the date of the injury, which is the amount of the partially dependent compensation without deducting the value of the board, contingent upon the affirmation of the findings and decision of the Industrial Accident Board in the case of *Murphy v. American Mutual Liability Insurance Company*, above referred to, it being further agreed that, should the decision be revised, the insurer would pay compensation in accordance with the decision of the Supreme Judicial Court, increasing or decreasing said compensation, and if decreased, crediting future payments due the administratrix to the insurer until the excess payments were balanced.

The committee of arbitration therefore finds that compensation is due the administratrix, the said Mary A. Hayden, in accordance with this agreement, viz., at the rate of \$6.25 per week.

DAVID T. DICKINSON.
BENJAMIN A. LOCKHART.
ARTHUR BANCROFT.

CASE No. 380.

HAZEL YOUNG, *Employee.*

J. E. DUNCAN, *Employer.*

FIDELITY AND CASUALTY COMPANY OF NEW YORK, *Insurer.*

EMPLOYEE WHO HAD NOT CLAIMED HER RIGHT OF ACTION AT COMMON LAW DISPUTES JURISDICTION OF COMMITTEE OF ARBITRATION. COMMITTEE TAKES JURISDICTION AND AWARDS COMPENSATION. EMPLOYEE PROCEEDS WITH COMMON LAW ACTION IN SUPERIOR COURT AND CASE IS TAKEN TO SUPREME JUDICIAL COURT, WHICH DECIDES THAT AN EMPLOYEE MUST GIVE NOTICE OF CLAIM OF RIGHT OF ACTION AT COMMON LAW AT TIME OF CONTRACT OF HIRE OR BE HELD TO HAVE ACCEPTED ACT.

This employee receiving a personal injury arising out of and in the course of her employment, the insurer admitted liability, and the compensation due under the act was offered. She declined to accept same and brought suit against her employer under the general law. The insurer, alleging a disagreement between the parties, requested a hearing before a committee of arbitration, and the employee formally objected, raising the question of the lack of jurisdiction of the said committee. The committee was formed and heard the evidence, which showed that a "notice to employees," informing them of the fact that their employer was a subscriber to insurance, was properly posted, and that the employee, Hazel Young, had not given the subscriber a notice of her claim to a right of action at common law.

Held, that all the rights of the employee on account of the personal injury received while in the employ of the subscriber are under the Workmen's Compensation Act, and compensation is due her in accordance with said act.

Note. — This decision was not appealed from, the employee having refused to recognize the jurisdiction of the committee of arbitration. The case was heard in the Superior Court and taken to the Supreme Judicial Court, which decided that an employee must give notice of his desire to avoid the Workmen's Compensation Act when he enters the employment of a subscriber, or he is held to have availed himself of the act. Counsel for employee argued that the act was unconstitutional because the employee was deprived of her constitutional right to a trial by jury, and the court ruled that the issue of fact, if it had been presented properly, as to whether the parties had come under the operation of said act, might be tried by a jury. Act held to be constitutional.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Hazel Young v. Fidelity and Casualty Company of New York, this being case

No. 380 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Joseph A. Parks, chairman, John G. Brackett, Esq., 89 State Street, Boston, Mass., representing the insurer, and Martin T. Joyce, 987 Washington Street, Boston, Mass., representing the employee, being duly sworn, heard the parties and their witnesses in the Selectmen's Room, Town Hall, Arlington, Mass., Saturday, Oct. 11, 1913, at 10 A.M.

Hazel Young, residing at 18 Swan Place, Arlington, Mass., was in the employ of J. E. Duncan, a manufacturing jeweler, Massachusetts Avenue, Arlington, Mass. On June 10 she was using matches, applying hydrochloric acid to rings in order to remove enamel. The acid got on the top of the matches and burned the thumb and forefinger of the right hand.

The insurer admitted that the employee received a personal injury arising out of and in the course of her employment, the only matter in dispute being the question of jurisdiction, which was raised by the attorney for the employee.

Previous to the hearing, Otto C. Scales, Esq., attorney for Miss Young, filed the following statement: —

In re the case of Hazel Young, employee, and Jefferson E. Duncan, employer, as to which you have notified Miss Young that there is to be a hearing to-day at 10 A.M. in Arlington Town Hall, Arlington, Mass., I beg to state that I appear before your committee this morning only for the purpose of objecting to your committee hearing any evidence in the matter, on the ground that Miss Young claims that your committee has no jurisdiction in the premises.

The committee noted the objections, but ruled that it had jurisdiction.

Jefferson E. Duncan, the employer, testified that he was a manufacturing jeweler, and had in his employ seven hands. He had taken out a policy of insurance on Aug. 24, 1912, which covered the Workmen's Compensation Act with the Fidelity and Casualty Company of New York, and had posted a notice the latter part of August, 1912, beside the time clock. The employees were obliged to go to the time clock to ring in and ring out four times a day. Miss Young did not reserve her common-law rights and entered his employ on Jan. 20, 1913.

Sarah Head, bookkeeper for Mr. Duncan, testified that there was a notice to employees that they were insured under the Workmen's Compensation Act posted about the latter part of August, 1912, and that the date of the policy was Aug. 24, 1912.

Chester L. Rich testified that he was in the employ of Mr. Duncan from the middle of June until Sept. 1, 1913, and had seen a notice advising employees of the Workmen's Compensation Act. It was posted on the wall near the time clock.

Hazel Young was then asked to testify. Her attorney, Otto C. Scales, objected, and a subpoena was then made out and served upon her. She was then sworn.

Hazel Young testified that while in the employ of Jefferson E. Duncan on June 10, 1913, she was applying hydrochloric acid by the use of sharpened matches to rings in order to remove the enamel. After finishing the rings she saw a little white speck on her finger, and it felt as though a pin had pricked it. After a while it began to spread and went on to the thumb. The following questions were then asked Miss Young: —

Q. How did you remember after you were injured that there was no notice posted? A. I went to Mr. Duncan the next morning, as of course I could not work. I saw him about 9 o'clock, and he then informed me that he was insured and that the insurance company would take care of the matter.

Q. Suppose there was such a notice posted before, would you go looking around the walls for it? A. No. I would not have looked for it.

Q. Nothing happened to make you think of this notice? A. I looked on the walls and saw what was there.

Q. This place by the clock is a place where you could see it? A. If there had been a light I could have.

Q. Can you swear positively that it was not there? A. I can.

Q. You also say that you made no special effort to look for it? A. I looked on the wall and knew what was there. I knew nothing of the notice until Mr. Duncan told me.

Q. Did you look then? A. I did not feel as though I wanted to look for anything.

Q. You base your statement that there was no notice on the fact that you looked upon the wall, and at the time you looked you did not see anything, and knew nothing about this notice? A. Yes.

Q. And you would swear that there was no notice posted? A. I do.

Q. You never heard any one talk about it? A. No, sir. Not before the accident. I have since.

Miss Young further testified that she had been unable to work because of the accident from June 10 to September 14. Asked as to why she held her arm rigid, she replied that she did not know that she did, and that it was lame. Miss Young is now employed by a telephone company in Wilton, Me., at a salary of \$6 per week.

Taking up the matter of the jurisdiction of the committee of arbitration, we find that the employer was a subscriber to insurance under the Workmen's Compensation Act before Hazel Young, the employee, entered into contractual relations with the said employer, and that under section 5, Part I., of the Workmen's Compensation Act all her rights are under said act and not under the common law.

Section 5, Part I., provides that "an employee of a subscriber shall be held to have waived his right of action at common law to recover damages for personal injuries if he shall not have given his employer, at the time of his contract of hire, notice in writing that he claimed such right, or if the contract of hire was made before the employer became a subscriber, if the employee shall not have given the said notice within thirty days of notice of such subscription."

In this case, the contract of hire was made after the employer had become a subscriber, and the employee had not given notice retaining her common-law rights at the time of her contract of hire. Therefore, "an employee of a subscriber shall be held to have waived his right of action at common law to recover damages for personal injuries," not having "given his employer, at the time of his contract of hire, notice in writing that he claimed such right."

Section 5, Part III., of the act provides that "if the association and the injured employee fail to reach an agreement in regard to compensation under this act, either party may notify the Industrial Accident Board, who shall thereupon call for the formation of a committee of arbitration." The language of this section is mandatory. The Industrial Accident Board "shall" call for the formation of a committee of arbitration "if the association and the injured employee fail to reach an agreement." It is further provided that if "either party does not appoint its member of this committee within seven days

after notification, as above provided, or after a vacancy has occurred, the Board or any member thereof shall fill the vacancy." (See section 6, Part III.)

The above sections make it clear: first, that an employee of a subscriber shall be held to have waived his right of action at common law if he does not serve notice in writing at the time of his contract of hire that he claimed such right; second, that the law makes it mandatory upon the Industrial Accident Board to form a committee of arbitration and hear the evidence, the only condition precedent to such mandatory action being that "the association and the injured employee fail to agree."

The requirement of section 15, Part II., that "no proceedings for compensation under this act shall be maintained unless a notice of the injury shall have been given to the association or subscriber," is not operative in a case like the one under consideration, where the "association or subscriber" expressly waives the requirement by asking for the formation of a committee of arbitration.

The committee of arbitration therefore finds, upon all the evidence, that the employer, J. E. Duncan, was a subscriber to insurance under the Workmen's Compensation Act prior to and at the time of the injury to Hazel Young, the said employee; that a "notice to employees," informing all employees of the said employer's subscription to insurance under said act, was posted at the time of said injury; that the said employer was a subscriber to insurance prior to the date upon which contractual relations were entered into with the said employee; that the said employee received a personal injury arising out of and in the course of her employment; that all her rights because of the receipt of said personal injury are under the Workmen's Compensation Act; that the said employee was incapacitated for work as a result of said personal injury from June 10, 1913, to Sept. 14, 1913; that her average weekly wages were \$5; that she is entitled to medical and hospital services during the first two weeks after the injury, that is, from June 10, 1913, to June 23, 1913, inclusive; and that she is entitled to the payment of a weekly compensation of \$4 from June 24, 1913, to Sept. 14, 1913, inclusive, that is, to the payment of a total sum of \$47.43, this being all the compensa-

tion due said employee from the Fidelity and Casualty Company for all incapacity for work resulting from said personal injury.

JOSEPH A. PARKS.
MARTIN T. JOYCE.
JOHN G. BRACKETT.

By agreement of the committee of arbitration, and at the request of Otto C. Scales, Esq., attorney for the employee, the following statement is incorporated in the record:—

Hazel Young, the said employee, made no claim for compensation, and refused to receive compensation under this act. The Fidelity and Casualty Company notified the Industrial Accident Board that the parties had failed to reach an agreement, as provided by section 5, Part III., of the act, and the Industrial Accident Board thereupon called for the formation of a committee of arbitration and notified the parties to name their representatives upon said committee. The employee neglected and refused to name her representative, and the Board filled the vacancy, as provided by said section 5, Part III. Otto C. Scales, attorney for the employee, objected to the swearing in of the committee and to all proceedings, stating that he contended that the committee had no jurisdiction, because the employee had made no claim for compensation under the act, and has made no agreement or otherwise submitted herself to the jurisdiction of the Board, and because she had no knowledge of the insurance of her employer under the act until after she received her injuries. No witnesses were presented by the employee, and the said employee, through her attorney, refused to offer any evidence in her behalf, or to cross-examine any witness, or take part in the proceedings, except to state his objections.

JOSEPH A. PARKS.
MARTIN T. JOYCE.
JOHN G. BRACKETT.

Decree of Supreme Judicial Court.

RUGG, C.J. Hazel Young received injuries arising out of and in the course of her employment while working for Jefferson E. Duncan. She brought an action of tort at common law against her employer, alleging that her injuries resulted from his negligent conduct. The defendant seasonably filed a paper entitled "Motion and Plea," setting out that he was a subscriber under the Workmen's Compensation Act at the time of the plaintiff's employment by him, and had continued so to be since, and that she neither at the time of entering his employment nor at any time thereafter gave him notice that she claimed her right of action at common law as provided in St. 1911, c. 751, Part I., § 5, and hence that she could not maintain her action at law, concluding with a prayer that the writ abate. Both parties treated this as a plea in abatement. The plaintiff had claimed a trial by jury. It is not necessary to determine whether this referred only to the general issues raised in her declaration or extended to the plea in abatement. She had a right to claim trial by jury upon the facts raised by this plea. (*O'Loughlin v. Bird*, 128 Mass. 600; *Oliver Ditson Co. v. Testa*, 216 Mass. 123.) But having proceeded to hearing upon the plea before the judge without objection, and without insisting upon a trial by jury as to the facts raised by it, that right if preserved up to that time was waived as to that point. Hence, no constitutional right to trial by jury is involved in this respect. The court allowed the motion. As a matter of construction this means that he found the facts as alleged in the motion. He excluded, subject to the plaintiff's exception, the affidavit offered by her tending to show that the defendant had not complied with section 21, Part IV., of the act, as amended by St. 1912, c. 571, § 16, as to giving notice to every person with whom he is about to enter into a contract of hire that he has provided for payment to injured employees under the act, and that no notice had been given her and she had no knowledge that the defendant was a subscriber under the act.

It must be presumed that the court found that the defendant was a subscriber under the act. That finding must stand, as the evidence upon which it was based is not reported. The

questions presented are, whether an employee must receive notice that the employer is a subscriber before he can be held to have waived his common-law rights, and whether the failure of the employer to give the notices required of him renders the act inoperative as to the unnotified employee, if the latter so elects.

The purpose of this act has been stated several times. Briefly, it was to substitute a method of accident insurance in place of the common-law rights and liabilities for substantially all employees except domestic servants, farm laborers and masters of and seamen on vessels engaged in interstate or foreign commerce, and those whose employment is casual or not in the usual course of trade, business or employment of the employer, and probably those subject to the federal Employers' Liability Act. It was a humanitarian measure enacted in response to a strong public sentiment that the remedies afforded by actions of tort at common law and under the Employers' Liability Act had failed to accomplish that measure of protection against injuries and of relief in case of accident which it was believed should be afforded to the workman. It was not made compulsory in its application, but inducements were held out to facilitate its voluntary acceptance by both employers and employees. It is manifest from the tenor of the whole act that its general adoption and use throughout the Commonwealth by all who may embrace its privileges is the legislative desire and aim in enacting it. The act is to be interpreted in the light of its purpose, and so far as reasonably may be, to promote the accomplishment of its beneficent design.

Part I., section 5, provides that "An employee shall be held to have waived his right of action at common law to recover damages for personal injuries if he shall not have given his employer, at the time of his contract of hire, notice in writing that he claimed such right, or, if the contract of hire was made before the employer became a subscriber, if the employee shall not have given the said notice within thirty days of notice of such subscription." This sentence is plain and definite. The employee is held to have waived his common-law right if he fails to give notice "at the time of his contract of hire." This absolute and unequivocal provision is not made dependent upon

any other condition or circumstance. It is not made to rest upon knowledge or notice to him of the fact that the employer is a subscriber. That it was not intended to be dependent upon such knowledge or notice is plain from the concluding clause, which in the event of the employer becoming a subscriber after the employment makes such waiver dependent upon notice. The expression of this condition in the one class of cases impliedly would exclude it from the other, even if the language used were less plain. It seems clear beyond a doubt from these words that the notice is required to be given when the terms of the employment are fixed by the contract of hire.

It is urged, however, that the effect of this unequivocal language is modified by Part IV., section 21, as amended by St. 1912, c. 571, § 16, which requires every subscriber to "give notice in writing or print, to every person with whom he is about to enter into a contract of hire, that he has provided for payment to injured employees by the association," and to file a copy of the notice with the Industrial Accident Board. This is a direction to the employer, but failure to comply with it does not carry with it any penalty either to him or to the employees, except that it may involve some consequences to the employer as shown by section 22. That it was not intended to be of rigid effect is apparent from the further provision that the notice may be given as there prescribed, "or in such other manner as may be approved by the Industrial Accident Board." Manifestly the rights of employees were not intended to be made to rest on a method of giving notice which may be changed from time to time by an administrative board as experience may evolve that which is most practicable. Moreover, this notice may have other uses in giving information as to hospitals and physicians available to employees in case of injury, as is pointed out in *Panasuk's Case*, *ante*. If the employee's right to avail himself of the act depended upon actual notice to him of the fact of insurance by the employer, hardship to the employee often might result. There would be strong ground for the argument (if the plaintiff's contention were upheld) that the only right of an employee would be at common law, unless the employer gave the required notice, — a consequence manifestly at variance with the general purpose

of the act, and one which in many instances would work great hardship. There is no indication in the act itself that Part I., section 5, and Part IV., section 22, were intended to be correlative or interdependent. Each stands alone with distinct uses and purposes. As thus interpreted the act is plain and easy of comprehension. If an employee desires to avoid the act and preserve his common-law rights, he must give notice to that effect in the absence of fraud when he enters the employment rather than when he is notified of insurance by the employer, or he is held to have availed himself of the act. This construction in the vast majority of cases will forward the beneficent aims of the act better than any other. The evidence offered by the plaintiff was excluded rightly.

This was not the reason for the ruling given in the Superior Court, but the accuracy of the reason given is of no consequence when the ruling is right. (*Randall v. Peerless Co.*, 212 Mass. 352, 384.)

It follows that the plaintiff had no occasion to try the question whether the employer had given the notice required of him under the act or the regulations of the Industrial Accident Board, and hence had no right to a trial by jury in that respect. If the parties are subject to the act then all their rights arising under it are to be settled by the agencies there provided, and not as in actions at common law. (*Panasuk's Case*, *ante*.)

The plaintiff argues that the act is unconstitutional as thus interpreted. An opinion was given by the justices to the General Court to the effect that the act would be constitutional if enacted. (Opinion of Justices, 209 Mass. 607.) This opinion, however, was advisory in character, given by the justices as individuals, without the benefit of argument, and was not an adjudication by the court, and the rule of *stare decisis* does not apply to it. (*Green v. Commonwealth*, 12 Allen, 155, 164; Opinion of Justices, 7 Pick. 125, 130; 126 Mass. 566; 214 Mass. 599, 604.) Therefore the ground is re-examined in the light of the argument now presented, without reliance upon the earlier opinion of the justices, and with the effort carefully to guard against any influence flowing from our previous consideration. Attack is made upon Part I., section 5, on various grounds. It is urged that it deprives the plaintiff of her constitutional

right to a trial by jury. If that question properly is presented and insisted upon, undoubtedly an employee has a right to a trial by jury on the point whether the employer was in truth a subscriber under the act, and whether notice had been given by the employee at the time of the contract of hire of an election to rely upon his common-law rights in cases where claim is asserted that such notice had been given. The issue of fact, whether the parties have come under the operation of the act, may be tried by a jury. It is analogous to the issue whether an agreement to arbitrate has been made. (*Boyden v. Lamb*, 152 Mass. 416.) It may be assumed that a right of action for personal injuries at common law is a property right; but the right of trial by jury respecting it goes no further in a case like the present than the right to have the question whether she had retained such a common-law right under the act determined by a jury. But as has been pointed out, so far as that right existed in the case at bar it was waived.

The section in question affects no existing property right. It deals with no property right after it has come into being. It affects a situation which antedates any property right arising out of tort. It simply establishes a status between subscribers under the act and their employees in the absence of express action by the latter manifesting a desire to elect a different status. No complaint justly can be made that the section compels the employee to elect without sufficient knowledge. Ignorance of the law commonly is no excuse for conduct or failure to act. The employee is not required to act without inquiry as to the fact of insurance by the employer. He has only to ask for information. That is nothing more than is required in most of the affairs of life in order that one may act intelligently. Knowledge as to interstate commerce rates may be inaccessible without very considerable inquiry, and yet shippers or passengers be bound by them although ignorant of their terms. (*New York, New Haven & Hartford Railroad v. York & Whitney Co.*, 215 Mass. 36, 39; *Texas & Pacific Railway v. Cisco Oil Mill*, 204 U. S. 449; *Kansas City Southern Railway v. Abers Com. Co.*, 223 U. S. 573, 594. *Boston & Maine Railroad v. Hooker*, 233 U. S. 97.)

The requirement that the election be made at the time of the

contract for hire is reasonable. Difficulties of a serious nature might be presented if the right of election were allowed to be exercised after the happening of the accident.

The possibility that the employee in a given instance may not know all his rights does not affect the constitutional aspects of the law. Many crimes even are made to depend solely upon the doing of an act with the utmost moral innocence and in ignorance of any forbidden aspect of the act. (*Commonwealth v. Mixer*, 207 Mass. 141.)

The employee is not compelled to give up any common-law or constitutional right. It is a matter of choice whether he avails himself of the one or the other. Reasonable provisions are made for the exercise of his election. (*Foster v. Morse*, 132 Mass. 354.)

The section is not open to objection as class legislation, or as denying equal protection of the laws. It applies to all employees alike. In this respect it is no more vulnerable than the Employers' Liability Act, which establishes remedies for the benefit of employees, the weekly payment law or many other acts of like nature. (*Opinion of Justices*, 163 Mass. 589; *Commonwealth v. Riley*, 210 Mass. 387; *Sturges v. Beauchamp*, 231 U. S. 320, 326 and cases cited; *Chicago, Burlington & Quincy Railroad v. McGuire*, 219 U. S. 549; *Mondou v. New York, New Haven & Hartford Railroad*, 223 U. S. 1; *German Alliance Insurance Co. v. Kansas*, 233 U. S. 389.) The act is constitutional and is not open to criticism in the respects urged by the plaintiff. It follows that judgment rightly was ordered for the defendant in the action at law.

Hazel Young received her injury on June 10, 1913. She made no claim under the Workmen's Compensation Act. But the insurer of her employer, acting under Part III., section 5, as amended by St. 1912, c. 571, § 10, which permits either party to act in case the insurer and the injured employee fail to agree as to the latter's compensation, notified the Industrial Accident Board of the accident, and a commission on arbitration was formed which made an award in favor of the employee. This course was warranted under the circumstances. (*Burt v. Brigham*, 117 Mass. 307.) A claim for review by the Industrial Accident Board was filed by the employee, but later with-

drawn before a hearing. Hence by Part III., § 7, as amended by St. 1912, c. 571, § 12, the decision of the arbitration committee stood and became enforceable in the Superior Court. The insurer, as permitted by the act, took proper proceedings in that court, and a decree correct in form was entered for the payment of compensation in accordance with the report of the arbitration committee. The employee attempted to appeal from this decree. But it is plain from Part III., § 11, as amended by St. 1912, c. 571, § 14, that no appeal lies under these circumstances from the decree of the Superior Court. That section provides that when a decree of the Superior Court has been entered "there shall be no appeal therefrom . . . where the decree is based upon a decision of an arbitration committee."

This is a provision obviously intended for the benefit of the employee to prevent any delay in receipt by him of the compensation. The machinery of the act is first a decision by the arbitration committee. If there is any dissatisfaction with this, the next step is a review by the Industrial Accident Board. If no such review is insisted upon, then there can be no further controversy on the facts, and the Superior Court, unless there is legal reason to the contrary, must enforce the award so made. The express provision of the act is that there shall be no appeal. In cases of errors of law apparent on the face of the record they may be corrected by certiorari, or perhaps by some other appropriate remedy. (*Young v. Blaisdell*, 138 Mass. 344; *Kiely v. Corbett*, 205 Mass. 158.) Plainly in the case at bar there is no irregularity or want of jurisdiction, and the proceedings are not open to objection. As there was no ground for appeal from the decree of the Superior Court, that appeal must be dismissed.

Exceptions overruled. Appeal dismissed.

CASE No. 382.

JOHN M. BARKSDALE, *Employee*.

R. S. BRINE TRANSPORTATION COMPANY, *Employer*.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *Insurer*.

EMPLOYEE'S INCAPACITY FOR WORK NOT DUE TO NEGLIGENCE TO
OBTAIN PROPER MEDICAL ATTENTION. COMPENSATION
AWARDED.

The insurer declined to pay compensation, on the ground that the employee had unreasonably neglected to obtain proper medical attention, and that such neglect constituted serious and willful misconduct. The evidence showed that the employee had not neglected to obtain such attention.

Held, that the employee was entitled to compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of John M. Barksdale *v.* Fidelity and Deposit Company of Maryland, this being case No. 382 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Joseph A. Parks of the Industrial Accident Board, chairman, M. H. Slobodkin, 39 Pemberton Building, Boston, representing the employee, and Addison M. Goldsmith, 14 Park Road, Winchester, representing the insurer, being duly sworn, heard the parties and their witnesses at the Hearing Room of the Industrial Accident Board, Pemberton Building, Boston, Mass, on Monday, Sept. 8, 1913, at 2 P.M.

This case came to the attention of the committee of arbitration on the contention of the insurer that the employee had not taken proper care of himself since he was injured, and therefore that he was not entitled to compensation, since any incapacity for work was the result of his own serious and willful misconduct in not properly caring for the injury.

It appeared in evidence that John M. Barksdale, the injured employee, was a lumper in the employ of the R. S. Brine

Transportation Company, earning an average weekly wage of \$13, and that while working for that company, on July 8, 1913, he was in the building of the Edison Electric Light Company, on Massachusetts Avenue, Boston, receiving furniture which was being handed down to him through a hole in the floor by two other men. While these two fellow employees were handing a table down to Barksdale, the table slipped out of Barksdale's hands, striking him on the shin, and causing an injury which incapacitated him for work. This incapacity existed at the time of the hearing.

Evidence was introduced to show that Barksdale had been treated at the Boston City Hospital on the 2d of August, and not until then, and on subsequent dates up to the time of the hearing. Mr. Hannon presented records of the Boston City Hospital, and Barksdale contended, in spite of the records, that he had been sent to the Boston City Hospital on the 8th of July by his employer, and had been treated there, and that he had been taking care of himself ever since. The chairman of the committee, being doubtful as to the testimony given, instructed Mr. Hannon of the hospital to make a thorough search through the records for any name that looked like Barksdale. The next day, September 9, Mr. Hannon had an interview with Mr. Parks, at the rooms of the Board, and told him that a thorough search had been made of the records of the Boston City Hospital, and that positively Mr. Barksdale's name did not appear, nor anything like it. Half an hour afterwards John Barksdale himself, the injured man, brought in a record, signed by J. W. McCollom, superintendent of the Boston City Hospital, which reads as follows: —

THE BOSTON CITY HOSPITAL,
BOSTON, Sept. 9, 1913.

This is to certify that it appears from the records of the Boston City Hospital that John Barksley was treated at the hospital as an out-patient July 8, 1913.

Diagnosis: contusion over left tibia.

He was also treated, under name of John Barksdale, in the out-patient department from August 2 to September 8.

Diagnosis: ulcer of upper left lower leg.

J. W. MCCOLLOM, *Superintendent.*

A. J. W.

The committee of arbitration finds, upon all the evidence, that John M. Barksdale, the injured employee, received proper medical attention, and that his right to compensation was not forfeited by any neglect which might be construed as serious and willful misconduct on his part.

The committee further finds that the injury arose out of and in the course of his employment, and that he is entitled to a reasonable reimbursement for payments made on account of medical and hospital services during the first two weeks after the injury, and for compensation at the rate of \$6.50 per week from July 22, 1913, to Sept. 8, 1913, inclusive, this compensation to be continued during his incapacity for work in accordance with the provisions of the Workmen's Compensation Act.

JOSEPH A. PARKS.

MYER H. SLOBODKIN.

ADDISON M. GOLDSMITH.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties and their witnesses at the Hearing Room, Pemberton Building, Boston, Mass., on Thursday, Oct. 23, 1913, at 10 A.M., and affirms and adopts the findings of the committee of arbitration.

The evidence introduced before the Industrial Accident Board showed that the employee, John M. Barksdale, owned a small variety store, which was not profitable, and that he spent his spare time there. He also lived on the premises, waiting on customers after his daily work was over, and during the time intervening between July 8, 1913, the date of the injury, and Oct. 23, 1913, the date of the hearing on review, spent much of his spare time in the store. It was in evidence that he waited on at least one customer since the date of the injury. There was a mortgage of \$50 on the store, and he owed two brothers somewhat in excess of \$110, the amount not being accurately stated. This money had been advanced by them to assist him in his financial difficulties. The claim that the employee had not taken proper care of the injury was not sub-

stantiated by the evidence. The employee testified that his legs were still sore, but that he was now able to resume his work.

The Board finds that all incapacity for work as a result of the personal injury received by the employee on July 8, 1913, ceased on Oct. 23, 1913, and that there is therefore due John M. Barksdale, the said employee, the sum of \$87.29 from the Fidelity and Deposit Company of Maryland, this being thirteen and three-sevenths weeks' compensation at the rate of \$6.50 a week. The Board finds that the employee is also entitled to reasonable reimbursement for payments made by him on account of medical and hospital services during the first two weeks after the injury, that is, from July 8, 1913, to July 21, 1913, inclusive.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 383.

FREDERICK D. JANES, GUARDIAN OF JOHN R. JANES.
JOHN H. COAKLEY, ADMINISTRATOR OF THE ESTATE OF JOSEPH
A. JANES AND THE ESTATE OF JOHN C. JANES, *Employee*.
NATIONAL FIREPROOFING COMPANY, *Employer*.
FIDELITY AND CASUALTY COMPANY OF NEW YORK, *Insurer*.

DEATH OF SURVIVING DEPENDENT CHILD. ANOTHER CHILD
LIVING. PECUNIARY RESPONSIBILITY OF INSURER NOT
AFFECTED BY CHILD'S DEMISE. COMPENSATION PAYABLE
TO SURVIVING CHILD. SUPREME JUDICIAL COURT AFFIRMS
DECISION OF BOARD.

The employee, a widower, died as a result of personal injuries arising out of and in the course of his employment, leaving two minor children wholly dependent upon his earnings for support. One of them died shortly after the decease of his father.

Held, that the sum due those wholly dependent should be paid the administrator for the benefit of the surviving child.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to Supreme Judicial Court.

Decision. — The Supreme Judicial Court affirms the findings of the Industrial Accident Board.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of the Dependents of John C. Janes *v.* Fidelity and Casualty Company of New York, this being case No. 383 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Joseph A. Parks, representing the Industrial Accident Board, chairman, William J. Drew of Boston, Mass., representing the dependents, and Daniel M. Lyons of Boston, Mass., representing the insurer, heard the parties and their witnesses at the Hearing Room of the Industrial Accident Board, Pemberton Building, Boston, Mass., Friday, Sept. 5, 1913, at 2 P.M.

The dependents were represented by John H. Coakley, Esq., and the insurer by John M. Morrison, Esq.

The attorney for the dependents of the deceased employee offered documentary evidence of the marriage of the deceased, and called two brothers of said deceased employee to prove that his two children, John R. Janes and Joseph A. Janes, the claimants, were his lawful issue. The insurer presented no evidence.

It was agreed by the parties that the employee, John C. Janes, died on Aug. 4, 1913, as a result of personal injuries received by him which arose out of and in the course of his employment, the said employee being employed as a laborer, or carpenter's helper, and while walking on a plank on the sixth floor of a building in the course of construction in Scollay Square fell to the second floor loading platform, dying instantly. It was further agreed that the employee received an average weekly wage of \$14.

Frederick D. Janes, living at 91 Malden Street, Everett, Mass., testified that he was a brother of the deceased employee, and that his brother had two children living at the time of the

accident, the oldest, John R., being two years old, and the youngest, Joseph A., being eleven months old. His brother's wife died on April 22, 1913, and John C. Janes, the said brother, asked him to take care of John R. Janes, the older child. Later his wife went to Newfoundland to visit the mother of the deceased, and deceased requested that the child be taken along. Deceased gave Frederick's wife \$5 with which to buy a hat and coat for the child and told her to tell the grandmother, with whom they intended to stay, that his circumstances were none too good since his wife's death, and as soon as he was able to do so, he would send her some money for the support of the child and provide for the child as long as he lived. The other child, Joseph A. Janes, died one week after the father's death.

Robert Janes, another brother, testified that the child John R. was sent to Newfoundland because the father believed it to be best, under the circumstances, to have the child live with the grandmother.

The committee finds that the employee, at the time of his decease, was a widower and left as his lawful issue two minor children, viz., John R. Janes, aged two years, born in Cape Breton in February, 1911, and Joseph A. Janes, aged eleven months, born at Livermore Falls, Me., in September, 1912.

The committee further finds, if material, that Joseph A. Janes, the second child of the deceased employee, died about one week after the death of his father, and that he was represented at the hearing by his next friend, John H. Coakley, afterwards appointed administrator of the estate of the said Joseph A. Janes.

The committee further finds that the said children were living with their parent, the said John C. Janes, at the time of the injury aforesaid, and were wholly dependent upon the earnings of said employee for their support at the time of the injury.

The committee further finds that the injury to the employee arose out of and in the course of his employment; that his average weekly wages were \$14; and that the dependents are each entitled to the payment of \$3.50 a week for a period of three hundred weeks from the date of the injury.

The committee further finds and rules that the death of the

dependent, Joseph A. Janes, after the death of his father, in no wise affects the right of the legal representative of such dependent to recover the same compensation the said dependent would be entitled to recover if now living.

The committee therefore finds that the sum of \$7 a week should be paid to John H. Coakley, administrator and legal representative of the estate of John C. Janes, to be paid by him in the sum of \$3.50 a week to Frederick D. Janes, as the guardian of John R. Janes, and a like sum of \$3.50 a week to be held by him as administrator of the estate of said Joseph A. Janes, for the benefit of John R. Janes, the surviving child and dependent of the deceased employee, the weekly payments to said guardian and administrator, respectively, to be continued for a period of three hundred weeks.

JOSEPH A. PARKS.

WM. J. DREW.

Report of Daniel M. Lyons, Arbitrator.

In this case I find the facts set forth in the agreement of the parties and in the evidence of the brothers of the deceased to be as stated in the report submitted by Chairman Parks and Arbitrator Drew. I find, further, that the employee at the time of his decease was a widower and left as his lawful issue two minor children, John R. Janes, aged two years, and Joseph A. Janes, aged eleven months, and that Joseph A. Janes died about one week after his father, and that his interest was duly represented at the hearing.

I find, however, if material, that the child John R. Janes was not "living with" his father at the time of the father's decease in the sense in which that term is used in the statute, and therefore is not presumed to have been dependent upon him.

Nevertheless, I find, as a matter of fact, that he was wholly dependent upon the father at the time of the father's decease, so as to entitle him to compensation under the act.

As to the child Joseph A. Janes, who died about a week after the father, I find he was wholly dependent upon his father at the time of the father's death, but I do not find that his

personal representative is entitled to any compensation which might be payable after the death of the child. This is the only effective point of difference between my finding and the majority report. As I view the statute I must find that this dependent is only entitled to compensation during his life.

I therefore find that the sum of \$3.50 a week should be paid to the guardian of John R. Janes for three hundred weeks, and that the sum of \$3.50 for one week should be paid to the administrator of Joseph A. Janes, should he be appointed. The above-named sums should be paid to John H. Coakley, administrator of the estate of John C. Janes, to be paid by him to the persons entitled thereto.

DANIEL M. LYONS.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, Pemberton, Building, Boston, Mass., Thursday, Oct. 23, 1913, at 3 P.M., and, revising the report of the committee of arbitration, finds as follows:—

The Industrial Accident Board finds that the employee, at the time of his decease, was a widower and left as his lawful issue two minor children, viz., John R. Janes, aged two years, born in Cape Breton in February, 1911, and Joseph A. Janes, aged eleven months, born at Livermore Falls, Me., in September, 1912, and that Joseph A. Janes, the second child of the deceased employee, died about one week after the death of his father, and that he was represented at the hearing by his next friend, John H. Coakley, afterwards appointed administrator of the estate of the said Joseph A. Janes.

The Board finds that the said children were living with their parent, the said John C. Janes, at the time of the injury aforesaid, and were wholly dependent, in fact, upon the earnings of said employee for their support at the time of the injury, Aug. 4, 1913.

The Board finds that the personal injury to said employee arose out of and in the course of his employment; that his average weekly wages were \$14; and that the dependents are

each entitled to the payment of \$3.50 a week for a period of three hundred weeks from the date of the injury; and further finds and rules that the death of the dependent, Joseph A. Janes, after the death of his father, does not affect the right of the legal representative of such dependent to recover the same compensation the said dependent would be entitled to recover if now living.

The Board finds, therefore, that the sum of \$7 a week should be paid to John H. Coakley, administrator of the estate of John C. Janes, to be paid by him in the sum of \$3.50 a week to Frederick D. Janes, the guardian of John R. Janes, and a like sum of \$3.50 a week to be held and applied by him under the provisions of law, as administrator of the estate of the said Joseph A. Janes, the weekly payments to said guardian and administrator, respectively, to be continued for a period of three hundred weeks from Aug. 4, 1913.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

Decree of Supreme Judicial Court on Appeal.

RUGG, C.J. This is a case under the Workmen's Compensation Act. The deceased employee, while a widower, died as a result of personal injuries which arose out of and in the course of his employment. The Industrial Accident Board found that his two minor children, of tender years, were both living with their parent, the employee, at the time of his injury, and were wholly dependent upon his earnings for their support. No ruling of law was involved in this finding. Hence, the insurer rightly has waived that portion of its brief devoted to the contention that this finding was not warranted. One of the minor children died about a week after the decease of his father. The same person has been appointed the administrator of the deceased employee, and of his deceased child. A decree was entered in the Superior Court, following the ruling of the Industrial Accident Board, to the effect that the sum allowed

under the act should be paid to the administrator of the estate of the deceased employee, and by him to be divided between the guardian of the surviving minor child and himself as administrator of the deceased minor child. The guardian of the living child did not appeal from this decree. The insurer alone appealed. Therefore the insurer alone has a standing to ask for a modification of the decree. But the insurer has suffered no harm by reason of that portion of the decree which directs the administrator of the deceased employee to divide the payment between the administrator of the deceased child and the guardian of the living child. It is argued that no payment can be made to the administrator of the deceased child. (See *United Collieries, Ltd., v. Simpson*, 1909, A. C. 383.) But that point is not open to the insurer. The amount which it is obliged to pay and the person to whom the payments must be made are the same whether the surviving child is entitled to the entire payment or whether there is a division. (Under St. 1911, c. 751, Part II., § 7 (c).) A child under the age of eighteen years, living with the parent, the deceased employee, at the time of his death, was conclusively presumed to be wholly dependent for support upon the deceased parent. The amount to be paid by the insurer is the same whether there are one or more children. The Workmen's Compensation Act does not contemplate, either in its letter or its spirit, that the insurer may litigate by appeal to this court the proportions of the division of a payment among those claiming to be dependent upon the deceased employee, when the dependents are satisfied, and do not appeal, and when the insurer cannot, by any possibility, be affected in its pecuniary responsibility by any modification permitted by law of the order for payment. In such case the insurer is not entitled to be heard upon the question of the division of the payments. The principle is the same as that applied in the division of damages arising from a taking by eminent domain among owners of several interests in a single estate. (*Cornell-Andrews Smelting Co. v. Boston & Providence Rd.*, 215 Mass. 381, 389.) We do not intimate an opinion as to the soundness in law of the decree in this respect.

Decree affirmed.

CASE No. 388.

JOSEPH McDONALD, *Employee.*

GEORGE R. HOBBS, *Employer.*

TRAVELERS INSURANCE COMPANY, *Insurer.*

EMPLOYEE ENTITLED TO COMPENSATION ON ACCOUNT OF
TOTAL INCAPACITY WHILE UNABLE TO OBTAIN WORK
BECAUSE OF THE INCAPACITY DUE TO THE INJURY.

The employee, a carpenter, lost the thumb, forefinger and little finger of his left hand by reason of their contact with a circular saw which he was operating. He obtained work at different times since the occurrence of the injury, but was discharged when his employers noticed his hand and found that he was unable to perform the work given him.

Held, that he was entitled to compensation on account of total incapacity for work.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Joseph McDonald *v.* Travelers Insurance Company, this being case No. 388 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of James B. Carroll of the Industrial Accident Board, chairman, Thomas E. Dempsey, Esq., representing the employee, substituting for Wm. H. Sullivan, originally named as the representative of the employee, the parties agreeing to this substitution, and William Prout, representing the insurer, being duly sworn, heard the parties at the Hearing Room of the Industrial Accident Board, Friday, Sept. 5, 1913, at 10 A.M. The insurance company was represented by L. C. Doyle, Esq.

It was admitted that Joseph McDonald was injured while he was working for George R. Hobbs, on the 19th of February, 1913, his thumb, forefinger and little finger on left hand being taken off at the second joint. While sawing a small 2½-foot board his hand slipped against the saw, cutting his fingers off. It was not questioned that he was entitled to \$4 a week, the minimum compensation, for a period of twenty-five weeks for the loss of his fingers, and \$4 a week during the term of his

incapacity, the only question in the case being, Is he now incapacitated? The plaintiff stated as follows:—

The employee is fifty-six years old and is a carpenter by trade, but has worked at a good many other things. He was a seaman for nine years and worked as a watchman for two years. For the past two months he has been looking for work, but could not obtain it. He went to different farmers and gardeners, but when they saw his hand they would not hire him. He worked for Geo. R. Hobbs for four years, receiving from \$8 to \$9 a week, but was cut down to \$7 when times were slack. He has a family, but they are all married, and he is now boarding with a Mrs. McFae in East Boston, paying her \$5 a week. He is a left-handed man and cannot hold anything with his left hand. He did not sign any statement from the insurance company saying that he was able to return to work on July 30, 1913, and would return to work as soon as he could secure a position which the incapacity, due to the injury, would not prevent him from performing. He could not read or write, but he did make his mark on one paper presented to him by the insurance company, because they informed him that he could not get any compensation until he did so. He did not know what was printed and written on this paper, and it was not read to him. He could handle a saw with either hand before the injury, but not quite so well with the right hand. He has obtained work two or three times since the injury, but when his employers saw his hand and found that he was unable to perform the work given him on account of this, they discharged him.

Samuel H. Littlefield, M.D., for the insurance company, testified as follows:—

This employee's thumb was amputated at the first joint. He lost $1\frac{1}{2}$ phalanges of his fourth finger and two phalanges and a portion of the third of his little finger, the surface of the parts of the stumps where the pressure comes being very tender, probably from disuse, but the tenderness is all on the point. In his opinion this man would be able to work with a hoe, rake or shovel, these being supported by the palm of the hand. It is a very useful hand. Besides the hand, there are other things which make the employee's physical condition poor. He has a cataract of the right eye, also a very large right inguinal hernia, and although he is only fifty-six years old, he is physically much older, because of the many hardships he

has undergone. These, together with exposure, poor surroundings, want and neglect, have reduced his vitality. It would be difficult to state whether this man was a right or left handed man on account of his inability to write.

The committee of arbitration finds on this evidence that the employee is incapacitated, and is entitled to compensation at the rate of \$4 a week from Aug. 1, 1913, the date upon which the last payment was made, to Sept. 5, 1913, inclusive, payments to be continued on account of the incapacity for work of the employee, in accordance with the terms of the Workmen's Compensation Act, as long as this incapacity exists.

JAMES B. CARROLL.

THOMAS E. DEMPSEY.

WILLIAM C. PROUT.

CASE NO. 389.

ANNIE O'BRIEN, WIDOW OF MICHAEL J. O'BRIEN, *Employee*.

WILLIAM H. COOK, *Employer*.

CASUALTY COMPANY OF AMERICA, *Insurer*.

INFERENCE OF FACT DRAWN BY COMMITTEE UPON THE EVIDENCE THAT EMPLOYEE WAS FATALLY INJURED BY REASON OF A PERSONAL INJURY ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT. WIDOW AWARDED COMPENSATION.

It was the custom of the employee to warn the stablemen of the arrival of teams by ringing a bell, and it was often his habit to look out of the window to notice whether the team had been admitted. "The sill was only 27 inches from the floor; the employee was a tall man; the floor was often wet, and in consequence might possibly be slippery; employees would be apt to lose their balance looking out of this window." The dead body of the employee was found on the ground underneath the window from which the employee looked to note the arrival and admission of teams a few minutes after the bell had been sounded to announce the arrival of one. There were no witnesses of the fatality.

Held, that the injury arose out of and in the course of the employment and that the widow was entitled to compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amend-

ments thereto, having investigated the claim of Annie O'Brien, widow of Michael J. O'Brien, v. Casualty Company of America, this being case No. 389 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Joseph A. Parks of the Industrial Accident Board, chairman, Atherton N. Hunt of 84 State Street, Boston, Mass., representing the insurer, and Richard H. Wiswall of 39 Court Street, Boston, Mass., representing the employee, being duly sworn, heard the parties and their witnesses at the Hearing Room of the Industrial Accident Board, Pemberton Building, Boston, Mass., on Tuesday, Sept. 2, 1913, at 2 P.M.

The question at issue in this case was whether the injury which caused the death of this employee arose out of and in the course of his employment.

Michael J. Woolihan, a fellow employee, testified that he worked for William H. Cook, the employer of the deceased, and is in charge nights after 7 o'clock, his hours being from 7 in the evening until 6 in the morning. Mr. O'Brien's work began at 5 o'clock in the evening. He stated that he worked on the first floor, and O'Brien worked on the fourth floor, three flights up. On the night of July 4, after the last team had come in, he shut the door and soon noticed that a crowd had gathered, and that they were shouting to attract his attention. They said a man had fallen from the window, so he opened the door and found O'Brien's body lying on the ground. He said it was O'Brien's custom to look out of the window when he heard a team coming, and then to ring a bell to let him know it was in. Very often people would come and knock at the door and a great deal of time would have to be wasted if he went each time; whereas, when O'Brien rung the bell, they knew on the first floor that a team was at the door waiting to get in. If he, Woolihan, was not available, O'Brien would come down himself and open the door. He further stated that the window O'Brien fell out of looks down over the stable door, and that the sill was about 2 feet 3 inches from the floor; there was a water-trough in the room where O'Brien worked, and sometimes the water ran over the top and wet the floor; he could not state, as a fact, that the floor was wet that night. O'Brien

cleaned all the harnesses the night before, and as this was the night of July 4 there were only a few horses out. When he, Woolihan, came on duty, there was only one horse out. There were no fireworks on the playground that night, and from where O'Brien lay he must have fallen out of the window at which he worked, and out of which he looked when he heard the teams coming.

John J. Crane, a fellow employee, testified that he was a harness cleaner and worked with O'Brien in the same room. On the night of the accident he went downstairs to take a harness off a horse that had just arrived, and O'Brien was all right when he left him. He further stated that O'Brien was a tall man, and that when he looked out of the window he generally dropped his knees on the sill, and held on with one hand. Sometimes the trough would flow over and the harness would drop on the floor, making it wet and somewhat slippery. It was O'Brien's custom to look out of the window frequently to see if teams were coming in, and when they did come to ring a bell notifying his fellow employees that a team waited admission. If there was a knock at the downstairs door O'Brien looked out, and sometimes he looked out after a team came in to see if the door was shut. People often came to the door after the teams arrived, and it was O'Brien's custom to look out to see who they were, and if the door was open he would ring a bell to let Woolihan know that people were waiting for him. In his (Crane's) opinion the window was a very dangerous one to look out of.

Herbert Benton, a foreman in the employ of William H. Cook for twenty-one years, stated that the building was of brick construction with a granite foundation, four floors in all, and that the windows on the various floors were of a good size, and the sills about 2 feet and 3 inches from the floor. He stated that the tank was not leaking at the time the accident happened, but that it was impossible to clean harnesses without getting the floor, which was of spruce and waterproof, wet. He had never told O'Brien to notify the men downstairs when the teams came in, nor had he ever told him not to do so. O'Brien's weekly wage was \$14, and that was his average

weekly wage. He further stated that one might be apt to lose his balance leaning out of the windows in the harness room.

Mrs. Annie O'Brien, widow of the deceased, testified that she was living with her husband at the time he was killed.

Upon the above evidence the committee of arbitration is required to decide whether the injury to the employee arose out of and in the course of his employment. If the claimant dependent widow is to receive compensation, the committee must be satisfied that the double condition implied by the words "arose out of and in the course of the employment" is complied with, and that the deceased employee, in all probability, having heard the warning that the team had arrived, had, as was his custom very frequently, leaned out to see if the team had passed in through the stable door, lost his balance, and fell to his death three stories below.

It is well established in England that it is proper to draw an inference from the testimony offered in favor of the employee if there is more than an even probability that the injury occurred as claimed, or against the claimant if the onus of proof is not discharged, and it is fair to assume that the evidence is as consistent with one view of the facts as the other.

There are many English cases in point, among them the following, all of which assist us in reaching a proper conclusion upon the evidence:—

The dependents of an employee whose duty was to start machinery, and who, having done so, should have passed out by a certain door, but who was found dead under some revolving shafting, recovered compensation. (*McNicholas v. Dawson*, 1 Q. B. 773, 1 M. S. 80.)

So, in the case of the employee who was being transported to his work in a railway carriage and who fell out of the car while in the act of putting a basket on the rack. (*Pomfret v. Lancashire & Yorkshire Rly. Co.*, 5 M. S. 22.)

So, in the case of a miner who injured his finger and afterwards died from blood poisoning. It was unexplained how he received it. When he left home his finger was uninjured; when he returned it was crushed. No one saw the injury occur.

Was it a fair inference of fact that he received the injury while at work? The Court of Appeals so held. (*Mitchels v. Glamorgan Coal Co., Ltd.*, 9 M. S. 16.)

So, too, in the case before us, the plain inference from the facts is that the employee, the said Michael J. O'Brien, received an injury which resulted fatally, and said injury arose out of and in the course of his employment. It was his custom, in accordance with the understanding he had with Woolihan, the man in charge during the night-time, to warn the stablemen of the arrival of teams by ringing a bell, and it was often his habit to look out of the window to notice whether the team had been admitted, this latter habit being due to the fact that at times the stablemen might be otherwise engaged, and not admit the team promptly, it being O'Brien's custom, in the latter event, according to the testimony of Woolihan, to go down himself and open the door. The sill was only 27 inches from the floor; the employee was a tall man; the floor was often wet, and in consequence might possibly be slippery; employees would be apt to lose their balance looking out of this window. A few minutes before the dead body of the employee had been picked up on the ground outside the stable, underneath the window where it was the said employee's custom to note the arrival of teams, the bell had been sounded as was customary when a team had arrived. It was also the employee's frequent custom to look out of the window after a team had come in to see if the door was shut, and this was a dangerous window to look out of, in the opinion of the witnesses. There was no claim of serious and willful misconduct on the part of the employee, nor was there any intimation of such misconduct in the testimony given at the hearing.

The natural inference, upon the evidence, and in view of the fact that it was the usual custom of the employee to go to the window after a team had been admitted to see whether the door had been closed, is that he once more went to this window, looked out, lost his balance and fell to his death.

The committee of arbitration, upon all the evidence, finds that the employee, Michael J. O'Brien, received an injury arising out of and in the course of his employment, said injury resulting fatally; that his average weekly wages were \$14; and

that his widow, Annie O'Brien, living with him at the time of the injury, is entitled to the payment of \$7 a week for a period of three hundred weeks from the date of the injury.

JOSEPH A. PARKS.

ATHERTON N. HUNT.

RICHARD H. WISWALL.

CASE No. 390.

KATHERINE E. DALTON, *Employee.*

NEW ENGLAND CONFECTIONERY COMPANY, *Employer.*

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., *Insurer.*

FACIAL PARALYSIS DUE TO TEMPERATURE OF WORK ROOM
A PERSONAL INJURY AND COMPENSATION AWARDED.

The employee, a chocolate packer, was obliged by reason of her employment to work in a packing room where the temperature ranged from 60° to 65° F. Facial paralysis, developing gradually, resulted from the employment conditions.

Held, that the injury arose out of and in the course of her employment.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Katherine E. Dalton v. Employers' Liability Assurance Corporation, Ltd., this being case No. 390 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of Edward F. McSweeney of Boston, Mass., chairman, representing the Industrial Accident Board, Mr. A. C. Neville of 12 Neptune Avenue, East Boston, Mass., representing the employee, and W. Lloyd Allen, Esq., of 60 State Street, Boston, Mass., representing the insurer, heard the parties and their witnesses in the Hearing Room of the Industrial Accident Board, 209 Pemberton Building, Boston, Mass., on Friday, Sept. 12, 1913, at 2 P.M.

Katherine Dalton, employed by the New England Confectionery Company, and insured in the Employers' Liability As-

surance Corporation, Ltd., on June 11, 1913, at about 10 o'clock in the morning, while at work, felt the right side of her face getting numb, her lips swelling and her tongue getting numb. These symptoms continued until the condition developed into facial paralysis. Miss Dalton remained away from work for two weeks. The question at issue is whether or not this injury is one which arose out of or was due to her employment, to determine whether or not the doctor is entitled to pay for his treatment of Miss Dalton.

The facts of the case are that Miss Dalton works in the chocolate packing room of the New England Confectionery Company, and in order that the candy should be in suitable condition to be packed, the packing room must be kept below a certain temperature, which varies between 60° and 65° F. This packing room, the technical name of which in the factory is the "cool room," is kept cool by an automatic arrangement, controlled from the engine room.

There being no dispute as to the facts, by agreement between all parties, Dr. Thomas F. Leen, physician in chief of the Carney Hospital, was selected as a competent impartial physician to make an examination of Miss Dalton, to determine whether or not this facial paralysis was due to or arose out of her employment. Under date of Sept. 17, 1913, Dr. Leen reports as follows:—

In making such a diagnosis it is important to know that there is a facial paralysis originating, so to speak, from within the brain, and a facial paralysis originating from disease of the nerve in its course to the facial muscles. When the former is present the upper branches of the nerve are not affected, as a rule, on account of the distance between the nuclear origins of its centers. Hence, as a result there is no paralysis of the upper part of the face, — the muscles of the brow and the lids. When the nerve itself is affected the entire face is paralyzed, including the brow and the lids. In Katherine Dalton's case, she has complete facial paralysis, which shows at once that the nerve itself has been affected from its exit from the brain to its attachment to the facial muscles. If the nuclear origins of the nerve were affected we would anticipate as well an accompanying paralysis of her right arm and right leg, or portions thereof, which are not present here. At the same time we would consider brain tumor, abscess, brain softening, and lesions of the internal capsule, — all which would present accompanying symptoms not present here. Therefore any brain origin of Miss Dalton's affection can be ruled out. Hence, we must

assume she is suffering from a peripheral nerve affection. In a girl of her age the only cause, practically speaking, is cold or exposure; and this we have present from Miss Dalton's employment in a candy refrigerator. Of course, syphilis may be the cause of facial paralysis in certain cases; but here, also, we have other symptoms which would aid in the diagnosis absent here.

Hence, from the foregoing, I conclude that Miss Dalton's facial paralysis was due to her employment.

THOMAS F. LEEN, M.D.

Dr. Leen was subsequently communicated with and said that when he used the term "candy refrigerator" he understood the temperature of the room referred to in which the employee worked never descended below 60° or exceeded 65° F.

The arbitrators find that the facial paralysis with which Katherine Dalton was afflicted on June 11, 1913, was received in the course of and arose out of her employment, and that she is entitled to the reasonable medical services provided in section 5, Part II., of the act.

EDW. F. MCSWEENEY.

AUGUSTINE C. NEVILLE.

W. LLOYD ALLEN.

CASE No. 391.

OSWALD DEVANEY, *Employee*.

LANCASTER MILLS, *Employer*.

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, *Insurer*.

MOTHER OF EMPLOYEE, PARTIALLY DEPENDENT, RECEIVES ALL OF HIS WAGES, AND IS ENTITLED TO A WEEKLY COMPENSATION OF ONE-HALF THEREOF.

The employee contributed all of his earnings to his mother, who was partially dependent upon him for support. Five other children contributed to the family fund. The father earned an average weekly wage of \$14.50. The only question involved was that of dependency.

Held, that the mother was entitled to a weekly compensation equal to one-half of his weekly contribution.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Oswald

Devaney v. American Mutual Liability Insurance Company, this being case No. 391 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Joseph A. Parks, chairman, Patrick F. Cannon of Clinton, Mass., representing the dependents of the employee, and Dr. G. A. Tobey of Clinton, Mass., representing the insurer, being duly sworn, heard the parties and their witnesses in the Selectmen's Room, Town Hall, Clinton, Mass., on Monday, Sept. 15, 1913, at 1 P.M.

The question involved was solely one of dependency, whether the dependents were entitled to a payment of one-half the average weekly wages of the employee, or to a lesser sum.

Oswald Devaney, the deceased employee, was employed as a card grinder in the employ of the Lancaster Mills, and was fatally injured while engaged in putting a belt over the shafting for the purpose of starting the cards. He was caught in the belt, being carried around the shafting, meeting death almost instantaneously.

Peter Devaney, father of the deceased employee, testified that at the time of the injury, June 13, 1913, the boy was sixteen years, five months and seven days old. His average weekly wages were \$11.07. The boy had contributed all of his wages to his mother, Mary Anne Cannon Devaney, since he first went to work, for a period of two years.

He further stated that there are nine children now in the family, Maria, Harold, Claude and Lillian being minors and not working, the other five working; Margaret, Gertrude and Regina paying \$4 per week for board, and Emmett and Peter earning \$5 per week, which was paid into the family fund. The father earned an average weekly wage of \$14.50.

The committee of arbitration finds that the deceased employee, Oswald Devaney, contributed the sum of \$11.07 per week to his mother, Mary Anne Cannon Devaney, during the twelve months preceding the injury, and that under section 6, Part II., of the Workmen's Compensation Act she is entitled, as a partial dependent, to the payment of \$5.535 per week for a period of three hundred weeks from the date of the injury, this being "a weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly

dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of his injury."

JOSEPH A. PARKS.

PATRICK F. CANNON.

G. A. TOBEY.

CASE No. 399.

FREDERICK ROBSON, *Employee*.

R. MARSTON COMPANY, *Employer*.

TRAVELERS INSURANCE COMPANY, *Insurer*.

EMPLOYEE WHO RECOVERS HIS ABILITY TO PERFORM CUSTOMARY WORK NOT ENTITLED TO COMPENSATION BY REASON OF HIS FAILURE TO MAKE A REASONABLE EFFORT TO DO SUCH WORK.

The employee was incapacitated for work for a time by reason of a strain upon his left shoulder received while he was pushing on a piece of joist in order to move a safe. The evidence showed that there was no restriction in his power to use the injured shoulder or arm, or in its field of motion, at the time of the hearing.

Held, that the employee was not entitled to compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Frederick Robson v. Travelers Insurance Company, this being case No. 399 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of David T. Dickinson of the Industrial Accident Board, chairman, Benjamin A. Lockhart, Esq., Barristers Hall, Boston, Mass., for employee, and William C. Prout, Esq., for insurer, heard the parties and their witnesses at the Board Room of the Industrial Accident Board on Wednesday, Nov. 5, 1913, at 10 A.M. The insurer was represented by L. C. Doyle, Esq. The employee did not attend the hearing, although the usual notice had been sent him from the office as to the place and time of the hearing.

The committee finds upon the evidence — that is, upon the

admission by the insurer of such fact — that the employee received an injury arising out of and in the course of his employment on March 9, 1913. He was then in the employ of R. Marston Company as a carpenter. His average weekly wages at the time of the injury were \$20. The injury was due to a strain upon his left shoulder received while he was pushing on a piece of joist in order to move a safe. The nature of the injury, upon testimony of Dr. Samuel H. Littlefield, called by the insurer, and upon statements of the employee made to said doctor, was a partial dislocation of the left shoulder. The capsule of said shoulder joint was, however, probably not injured, but at the most only slightly.

He had been paid compensation by the insurer for nine weeks at \$10 per week, until May 26, 1913, when he went to work for another employer in another line of work at \$14 per week. He was paid on June 2 and June 9, 1913, respectively, a payment of \$3 each, his compensation for a partial disability on the basis of half the difference between \$14 and his former wage of \$20. Upon said June 9, 1913, his compensation was stopped on the ground that he was able to do such carpenter work as he was formerly doing at the time of the injury. Said stopping of compensation was based upon the report of Dr. Littlefield, who had examined the employee and made the report thereof to the insurer.

The committee finds that he had recovered his ability to do such work as he was doing in the course of his employment when injured, by June 9, 1913; that there was no restriction then in his power to use his injured shoulder or arm, or in its field of motion; that there was a lack of will or energy on his part to undertake again such work as he was formerly doing at the time of the injury, but no real disability in doing so; that if said employee makes a reasonable effort he can do such work as formerly.

The committee makes this finding subject to a right on the part of said employee to a review, in accordance with the Workmen's Compensation Act and amendments thereto, if the facts warrant.

DAVID T. DICKINSON.

WILLIAM C. PROUT.

BENJAMIN A. LOCKHART.

CASE No. 404.

GUISEPPE GARIELLA, *Employee*.

LUDLOW MANUFACTURING ASSOCIATES, *Employer*.

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, *Insurer*.

PERSONAL INJURY LIGHTS UP INFLAMMATORY CONDITION AND
NECESSITATES AMPUTATION OF LEG. COMPENSATION
AWARDED.

The employee received a personal injury by reason of a blow from a 12-pound sledge hammer which he was using, said sledge hammer missing the drill at which it was aimed and striking the said employee with considerable force on the left ankle, thus lighting up an inflammatory condition which has been described as a mild chronic osteomyelitis, which afterwards necessitated the amputation of the leg.

Held, that the employee was entitled to compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Guiseppe Gariella v. American Mutual Liability Insurance Company, this being case No. 404 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of James B. Carroll, chairman, Franklin N. Newell for employee, and Elisha Brewster for insurer, heard the parties and their witnesses in the Auditor's Room, Court House, Springfield, on Saturday, Sept. 27, 1913, at 9.30 A.M.

Thomas H. Kirkland, Esq., appeared for the employee, and Edward C. Stone, Esq., of Boston appeared for the insurer.

The plaintiff, who was in the employ of the Ludlow Manufacturing Associates at Ludlow, Mass., was injured on Dec. 9, 1912, and his average weekly wages were \$9.50.

While he was at work drilling, and in the act of striking the drill with a sledge hammer, in some way the sledge hammer instead of striking the drill struck the plaintiff in the left ankle. After the accident, plaintiff was taken to the office of Dr. Hoyt, and from there to the Ludlow Hospital, where he remained three weeks, after which he went to the Mercy Hospital at

Springfield, where he remained four and one-half weeks. He then went to the German Hospital, where he was treated by Dr. Meisenbach, and there his left leg was amputated below the knee.

On Dec. 11, 1911, when he was employed in hauling jute bales, one of the bales fell against his left leg and injured it about halfway between the ankle and knee. At that time he was attended by Dr. Triechler, who treated him for the injury.

The insurance company had paid him compensation at the rate of \$4.75 per week, being one-half his weekly wages, for a period of fourteen weeks, to wit, up to March 31, 1913.

It was claimed by the insurer that the loss of his leg and his present incapacity to labor was not the result of the injury which he received on Dec. 9, 1912, but was the result of a chronic osteomyelitis which existed at the time of that injury, and was caused by the injury of Dec. 11, 1911. It was also claimed by Dr. Triechler, who was called by the insurer, that the man had syphilis, and that his leg was a syphilitic leg.

Dr. Van Allen, also called by the insurer, claimed that the X-ray pictures which he had taken of the man's leg showed that the leg was not syphilitic, but that he had a bad case of osteomyelitis.

The testimony for the insurer tended to show that the claimant's left leg was affected with osteomyelitis at the time of his injury and had been in that condition for some time, and that that condition might have made it necessary at some time to amputate his leg. The testimony of the insurer also tended to show that the injury of Dec. 9, 1912, accelerated this latent disease to such an extent that amputation became necessary.

The claimant testified that he had been engaged with practical regularity from December, 1911, to December, 1912, in manual labor in the ordinary outdoor work of a laborer, and, while at times his leg bothered him, he continued to work with it without serious inconvenience.

At the close of the evidence employee was examined by Dr. Philip Kilroy, an impartial physician selected by a member of the Industrial Accident Board, and his report is substantially as follows: —

I have examined carefully Joseph Garielli, or Sirocelli, his wife and children; have consulted with all the doctors who have been connected with the case, examined the records in the Mercy Hospital, Springfield, and got the result of the microscopic examination of the amputated leg; and believe the following to be the essential facts of the case: —

He had some disease of the left leg for some time (a mild chronic osteomyelitis is probable), and this dated presumably from an injury by a falling bale in 1911. The suggestion that it might be due to syphilis is wholly unwarranted; neither he, his wife nor his children present the slightest evidence of having or ever having had this disease. Whatever the condition, he evidently was able to use his leg to a considerable extent until the injury of Dec. 9, 1912. Following the injury the leg grew worse, although he was put to bed promptly and placed in circumstances calculated to make such a leg improve. He was removed to the Mercy Hospital, where the records give the disease as osteomyelitis, operation, drainage after incision, and the result improvement. Three months later he entered a hospital in Buffalo, and after some months of varying treatment a microscopic examination showed that he had osteosarcoma, a malignant disease similar to cancer in its nature.

I don't see how we can avoid the conclusion that the injury of Dec. 9, 1912, was the occasion of lighting up a malignant condition in what had been, up to then, an inflammation; and the malignancy necessitated an operation (amputation) which the inflammation might never have.

Dr. Mahoney, surgeon of the Mercy Hospital, states that in his opinion the condition found at the time of the operation could have resulted from the injury of three weeks previous.

Upon this evidence we find that the injury to the employee's leg resulting in its amputation arose out of and in the course of his employment; that the injury occurred on the 9th of December, 1912; that he is entitled to compensation at the rate of \$4.75 for a period of fifty weeks for the loss of his leg, and compensation at the rate of \$4.75 a week from the thirty-first day of March, 1913, up to the present, and to continue as long as incapacity for labor exists, in accordance with the provisions of the Workmen's Compensation Act.

JAMES B. CARROLL.

Except as contained in statement subscribed by me and hereto attached.

FRANKLIN N. NEWELL.

Except as modified in statement subscribed by me and hereto annexed.

ELISHA H. BREWSTER.

Franklin N. Newell of the arbitration committee in the case of Guiseppe Gariella, No. 404 on the files of the Industrial Accident Board, hereby assents to each paragraph of the report except that marked A. For paragraph A he wishes to substitute the following: —

Of the medical witnesses for the insurer, Dr. Treichler testified in answer to Mr. Carroll: "The disease [that existing prior to the accident of Dec. 9, 1912] would not in my opinion have necessitated the amputation."

Dr. Hoyt testified: "Would not expect amputation if there had been no injury" (Dec. 9, 1912).

Dr. Van Allen testified that without the injury of Dec. 9, 1912, "Might never have been amputation." "Would have gone on with leg without amputation with some treatment." "Couldn't say that amputation would be necessary independent of injury."

He believes that the statements in paragraphs B and C are correct reports of the conclusions of skillful and impartial physicians, although they did not testify before the committee, and he has no knowledge other than the statements in said paragraph.

FRANKLIN N. NEWELL.

From the evidence offered before the committee, together with the report of Dr. Kilroy, I am of the opinion that the effect of the injury of Dec. 9, 1912, was to accelerate the progress of a malignant disease that had been induced by the earlier accident of Dec. 11, 1911, and which would probably have made amputation eventually expedient had the accident of Dec. 9, 1912, not occurred. The effect of the later accident was to hasten the time when amputation became necessary or desirable.

If, as a matter of law, this would entitle the employee to compensation under the act, then I concur in the conclusion set forth in the last paragraph of the report regarding the amount of compensation to which the employee is entitled.

ELISHA H. BREWSTER.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, Pemberton Building, Boston, Mass., Thursday, Nov. 13, 1913, at 10 A.M., and affirms and adopts the findings of the committee of arbitration. Thomas H. Kirkland, Esq., represented the employee, and Charles E. Hodges, Esq., represented the insurer.

By agreement of counsel, the following hospital record was admitted as evidence: —

Joseph (Guiseppe) Garcinelli (Gariella) married, age 40.

Entered German Hospital April 12, 1913.

Discharged from hospital July 29, 1913.

Patient of Dr. Tartaro, — Dr. Meisenbach, consultant.

May 17, 1913, Dr. Meisenbach curetted tumor of left tibia; microscopical examination.

Spindle-celled sarcoma.

Given mixed and autogenous vaccine injection May 23, 26, 28, 31, June 4, 30, and July 5.

Transferred from private case of Dr. Meisenbach to ward service of same hospital (June 1?).

Operation by Dr. Marcel Hartwig, attendant surgeon, German Hospital, July 19, 1913.

Operation, amputation of left leg at knee joint for spindle-celled sarcoma of ankle.

No other evidence was introduced.

The Board finds upon all the evidence that Guiseppe Gariella, the employee, received a personal injury arising out of and in the course of his employment on Dec. 9, 1912, by reason of a blow from a 12-pound sledge hammer which he was using, said sledge hammer missing the drill at which it was aimed and striking the said employee with considerable force on the left ankle, thus lighting up an inflammatory condition which has been described as a mild chronic osteomyelitis, which afterwards necessitated the amputation of the leg.

It was in evidence that the employee had received an injury to the left leg by reason of the fall of a bale of jute on Dec. 11, 1911, but the evidence also shows that the said employee worked with practical regularity from December, 1911, to the

time of the last injury, at the regular work of a laborer, the nature of which is shown by the fact that during a considerable portion of that period he was engaged in work as a driller and was required to stand upon his feet and swing a heavy sledge nine hours daily. That he was able to perform this work constantly for the twelve months preceding the injury shows that he was not seriously troubled by the inflammatory condition of his ankle and that, had it not been for the said injury, amputation would probably never have been necessary.

Whatever the condition of the ankle prior to the occurrence of the personal injury of Dec. 9, 1912, the said employee had not been incapacitated for work, and all incapacity for work since that date is due to the said personal injury, and he is entitled to compensation under the statute. (*Willoughby v. Great Western Railway Co.*, 6 W. C. C. 28; *Dunham v. Clare*, 4 W. C. C. 102; *M'Innes v. Dunsmuir & Jackson, Lim.*, 1 B. W. C. 226; *Ystradowen Colliery Co. v. Griffiths*, 2 B. W. C. 357.)

The Industrial Accident Board finds that the said Guiseppe Gariella is now totally incapacitated for work, and that said total incapacity for work will continue for an indeterminable period, said total incapacity for work resulting from a personal injury received by him on Dec. 9, 1912; and that there is due him from the American Mutual Liability Insurance Company fifty weeks' additional compensation for loss by severance of his left foot above the ankle, dating from said Dec. 9, 1912, at the rate of \$4.75 a week, a reasonable allowance for medical services rendered from Dec. 9, 1912, to Dec. 22, 1912, inclusive, and the payment of compensation on account of total incapacity for work, beginning on Dec. 23, 1912, at the rate of \$4.75 a week, to be continued during the period of said total incapacity for work.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
JOSEPH A. PARKS.

CASE No. 411.

MARY ALICE LIGHTBOWN, WIDOW OF JOHN H. LIGHTBOWN,
Employee.

HARGRAVES MILLS, *Employer.*

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, *Insurer.*

EMPLOYEE DROPS UNCONSCIOUS TO THE FLOOR IN HIS PLACE
OF EMPLOYMENT AND RECEIVES NO HURT OR HARM OR
INJURY OF ANY KIND. THIS IS NOT A PERSONAL IN-
JURY, AND THE WIDOW IS NOT ENTITLED TO COMPENSA-
TION.

The employee had been away from his place of employment on an errand and had returned, when suddenly, while watching his subordinate repair a warp, he fell to the floor unconscious. The employee had not been performing any act in the course of his employment; he had not made any undue exertion; he had started to assist his loomfixer when he dropped to the floor without warning of any kind. He had not received any hurt or harm or injury and died twenty minutes later. The medical examiner, and the physician who was called to attend him, diagnosed the case as heart failure.

Held, that the employee died from natural causes and his widow was not entitled to compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Mary Alice Lightbown, widow of John H. Lightbown, *v.* American Mutual Liability Insurance Company, this being case No. 411 on the files of the Industrial Accident Board, reports as follows:-

The committee of arbitration, consisting of Joseph A. Parks, representing the Industrial Accident Board, chairman, John T. Coughlin of Fall River, Mass., representing the employee, and John H. Gifford, M.D., of Fall River, Mass., representing the insurer, heard the parties and their witnesses at the Aldermanic Chamber, City Hall, Fall River, Mass., on Tuesday, Sept. 23, 1913, at 10 A.M.

The sole question at issue was whether the heart disease from which the employee died was a personal injury under the Workmen's Compensation Act, and whether it arose out of and in the course of the employment.

The evidence in the case is substantially as follows:—

Albert Lightbown, a brother of the deceased employee, stated that his brother John went to the King Philip mills on the morning of his death to obtain a patent attachment to put on a loom in the Hargraves mills. This loom was giving his brother considerable annoyance, and the superintendent gave him permission to go. He had not complained of illness before leaving the mill, and noticed nothing unusual about his appearance when he returned. Five minutes later he saw him laid out in the mill office unconscious. He tried to revive him, but without success. Another brother, James Lightbown, testified that he was an overseer in the King Philip mills and that he showed him the attachment for the loom. His brother remained with him an hour and was taken around the plant. His visit to the King Philip mills was in the interests of his employers.

Oliver Robillard, a loomfixer at the Hargraves mills, said that Lightbown, the deceased, returned, walking up the stairs quickly. They looked at the cloth upon which he was working and he noticed nothing unusual about him, nor did he make any complaint about overexertion. There were a few threads broken off on the back of the warp on the loom and the deceased said in effect, "We will fix it together." Robillard walked back of the loom, fixing it from behind, and suddenly a noise attracted his attention. He looked back and saw the deceased lying on the floor. He obtained assistance, helped to carry him downstairs, and the employee died twenty minutes later. Victor H. Roberts, second hand at the Hargraves mills at the time of Lightbown's death, saw the employee when he came back from the King Philip mills, and stated that he had made no complaint of any sickness or distress.

Mary Alice Lightbown, widow of the employee, stated that she lived with her husband at the time of his death, had four children, and that he had never been sick at all before the day of his death. On the morning of his death he went to work, as usual, about 6 o'clock, and called at the house on his way to the King Philip mills, at about 7.45, stating that he was going to the mills to see an attachment for a loom. He came back again at 10 o'clock, had a chat with her and something

to eat. He told her again of his errand to the King Philip mills. He did not complain of any illness or distress. The next news she had was of her husband's sudden death.

Dr. Thomas F. Gunning, medical examiner, testified that his diagnosis of heart failure was based upon the information gained from a few bystanders, as there was no previous history in the case. It looked like cardiac death to him.

Dr. Thomas E. Boylan testified that he was called upon to attend the deceased, and worked on the body in an attempt to bring back life. As far as he could testify, he agreed with Dr. Gunning's diagnosis of heart disease as the cause of death.

The committee of arbitration finds, upon this evidence, that the employee did not receive a personal injury arising out of and in the course of his employment, and cannot find any evidence that the heart disease, from which the employee died, was incidental to or attributable to his employment. The evidence shows that he was apparently a healthy man, who had never been ill before. He had been permitted to go on an errand, in the course of his employment, to another mill to obtain information which would be helpful to his employer. On the way to that mill he stopped at his home to chat with his wife; he appeared to be in his usual good health. Returning, he again calls on his wife, this time stopping long enough to partake of a luncheon; he did not then complain of any illness or distress. He returns to the mill, the loomfixer, Robillard, testifying that he "walked up the stairs quickly." But nothing unusual was noticed in his appearance and he did not make any complaint about overexertion. There is something wrong with the warp of a loom, and the deceased employee suggests that he and the loomfixer, Robillard, fix it. This Robillard commences to do, when suddenly he hears a noise and, looking around, sees the employee lying on the floor, unconscious. The employee had not been performing any act in the course of his employment, he had not made any undue exertion or any unusual exertion; he had simply started to assist his loomfixer, when suddenly, without warning, he dropped unconscious to the floor, receiving no hurt or harm or injury of any kind. He passed away twenty minutes later. The medical examiner, and the physician who was called to

attend him, diagnosed the case as one in which death was caused by heart failure. The conclusion seems to be obvious, to wit: John H. Lightbown, the deceased employee, died from natural causes, his death not arising out of and in the course of his employment.

The committee further finds that the widow, Mary Alice Lightbown, is not entitled to compensation.

JOSEPH A. PARKS.
JOHN H. GIFFORD.
JOHN T. COUGHLIN.

CASE No. 414.

RICHARD CANTWELL (DECEASED), *Employee*.
BOWLER BROTHERS, LTD., *Employer*.
TRAVELERS INSURANCE COMPANY, *Insurer*.

HYPOSTATIC PNEUMONIA FOLLOWING PERSONAL INJURY AND SUBSEQUENT OPERATION CAUSES DEATH. COMPENSA- TION AWARDED WIDOW.

The employee, a brewery worker, slipped and fell while employed in the bottling department of the subscriber, dislocating the clavicle. He was operated upon three days later and died of hypostatic pneumonia caused by the weakening of his system by reason of said operation.

Held, that the widow was entitled to compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Alice Cantwell v. Travelers Insurance Company, this being case No. 414 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of James B. Carroll, chairman, Winfred H. Whiting for insurer, and Daniel P. Callahan for employee, heard the parties and their witnesses in the Committee Room, City Hall, Worcester, Mass., on Sept. 24, 1913, at 10 A.M. Mrs. Alice Cantwell, widow of the employee, was represented by Charles J. Hickey, Esq., and the insurer was represented by Daniel F. Gay.

Richard Cantwell was employed by Bowler Brothers Brewery, at an average weekly wage of \$15.50. On the 19th of May, while working in the bottling department, he slipped on the floor and fell and suffered a dislocation of the clavicle. He was taken to St. Vincent's Hospital on May 22, and on May 23 he was put under the influence of ether, operated upon, and following this he contracted hypostatic pneumonia and died from pneumonia on June 5. After he was operated upon he went into a delirium. He left a widow and two minor children.

The material testimony in the case was as follows:—

Alice Cantwell, widow of the employee, testified:—

When my husband came home from work on May 19 he complained of his neck being stiff. I rubbed his neck with oil. He went to work the next day, but came home at noon. At that time there was a large lump on his neck. The next day, Wednesday, he went to see Dr. Fox.

Richard A. Cantwell, son of the employee, testified that there was a big bulge on his father's neck on Tuesday, and that his father told him that he had slipped while at work piling cases and that he did not mind it at all until he came home from work. The next day he attempted to work, but found that he could not do so. On Wednesday morning the bone protruded more, and that afternoon he went to see Dr. Fox.

Dr. Michael B. Fox, testified:—

On May 21 Mr. Cantwell came to my office and I found that he had an irreducible dislocation of the right clavicle. I recommended him to Dr. Barnes. He went to the hospital the following day and was operated on May 23. His condition from the day following the operation proved to be quite a shaky one. He started to get terribly nervous and suffered from delirium tremens, and this state grew worse, so much so that he had to be taken from a private ward and put in a private room in order to avoid disturbing the other patients. He developed hypostatic pneumonia after three or four days, and died on June 5 from pneumonia, and this pneumonia that developed was caused by the operation.

Dr. J. Arthur Barnes testified:—

Mr. Cantwell came to my office on the 21st of May. He had a dislocated clavicle at the sternal junction. On May 23 he was operated upon. The operation consisted in cutting down over the site of the trouble, finding the dislocation, replacing the bone in its normal position and sew-

ing the capsule, which was badly lacerated, and then sewing the skin and the fascia together in the usual manner. He recovered from ether in the normal way, but during the night he developed delirium tremens. He continued in that moderate delirium for a few days and then he got worse. He became semiconscious after this, had a marked cough, and the lungs on examination showed that he was suffering from pneumonia. He gradually grew worse until he died on June 5. This pneumonia that resulted in his death was caused by the etherization, operation and weakening of the system.

The committee of arbitration rules that the injury arose out of and in the course of his employment, and that death resulted therefrom, and finds that Alice Cantwell, widow of employee, is entitled to compensation for a period of three hundred weeks from the date of the injury, May 19, 1913, at \$7.75 a week.

JAMES B. CARROLL.
DANIEL P. CALLAHAN.
WINFRED H. WHITING.

CASE No. 419.

JOB STICKLEY, *Employee*.
THOMAS CAVANAGH, *Employer*.
ROYAL INDEMNITY COMPANY, *Insurer*.

EMPLOYEE ENTITLED TO COMPENSATION ON BASIS OF TOTAL
INCAPACITY FOR WORK WHILE UNABLE TO OBTAIN WORK
BECAUSE OF THE INCAPACITY DUE TO THE INJURY.

The employee received a personal injury by reason of which he suffered the loss by severance of four fingers of his right hand. He was afterwards given work by his former employer as a watchman at a reduced rate of wages, and was paid by the insurer on the basis of his partial incapacity. Later he was put to work at his former occupation of pile driving, and was obliged to leave because of his inability to perform this work by reason of the incapacity due to the injury. Subsequent efforts to secure employment were unsuccessful.

Held, that the employee was entitled to compensation for an indefinite period on the basis of total incapacity.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to Supreme Judicial Court.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Job Stickley v. Royal Indemnity Company, this being case No. 419 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of James B. Carroll, chairman, representing the Industrial Accident Board, E. Barton Chapin, representing the insurer, and Charles Henry Gray, representing the employee, heard the parties and their witnesses at the Hearing Room of the Industrial Accident Board, Friday, Nov. 7, 1913, at 11 A.M.

The employee was represented by John P. Vahey, Esq., and the insurer by W. L. Luther, Esq.

This employee was injured while in the course of his employment, the injury resulting in the loss of four fingers of the right hand. The material testimony was substantially as follows:—

Job Stickley, living at 719 Cambridge Street, East Cambridge, Mass., testified that he was injured on Dec. 13, 1913, while in the employ of Thomas Cavanagh, his wages at this time being \$16.50 a week. He first started to work after the accident on the 16th of May, 1913, at Cavanagh's, and worked a few days at a time up to October 17. Mr. Cavanagh first employed him as a watchman and paid him \$14 a week, but later put him back on his old job, pile driving, at \$2.75 a day. From the time he started to work at Cavanagh's he had only worked eighteen days. He had gone to many places seeking employment, but had been unable to obtain any on account of his inability to perform the work with only one hand. He went to many of the contractors he knew, thinking that if they had anything he could do they would give it to him, but there were no watchmen's places vacant, and the other work he could not do. Before he ever went to work for Mr. Cavanagh he did carpenter's work, and this was not steady, but when he would get out of a job he would go and get another one. Since May 16 he very often went down to see Mr. Coffin, business agent of the union, but he could do nothing for him. He has

received in all \$404.25 from the insurance company, the last settlement receipt he signed being dated July 11, 1913. The only times that he did not work when he might have was one day when he went to his lawyer, and three days when he was sick.

Seymour Coffin, business agent for the union, stated that Mr. Stickley has been to him looking for employment many times during the past year, but he has been unable to help him on account of his incapability to work. He stated that Mr. Stickley could not possibly do the work of pile driving with only one hand. There has been a demand for thirty or forty men to do pile driving at one time, but he could not send Mr. Stickley because he knew he would not be able to do the work. The wages of a pile driver are \$3.20 a day, but it requires a man with two hands to earn his money. The pile-driving business is not a steady one. Sometimes there are 400 men working and sometimes only 250. Mr. Stickley is so incapacitated that the union will not take him in.

Mr. Stickley, a brother of Job Stickley, testified that he sees his brother two or three times a week to inquire how he is getting along and to see if he has been able to get something to do. He tried to get his brother a position where he works, Geo. W. Norton Company, Somerville, manufacturers of soap and tallow renderers, but could not find anything he could do. He stated that he always finds his brother at home nights, but he tells him that he has been out all day looking for work but could find none.

Mr. Cavanagh stated that Mr. Stickley has worked for him since he has been well enough to, off and on, and he has always found his work satisfactory. He stated that he put him on a job out on Huntington Avenue. In the day time there were two men working on it, and Mr. Stickley was put on it at night, and the work went along just the same, showing that he could do the work satisfactorily. He also stated that a man can roll a pile-driving machine with one hand as well as with two. He offered Mr. Stickley a position in the yard, but would not guarantee him steady work. He said he thought he would be ready to hire a man for this work about the 1st of December, but this work would probably not last longer than

seven months out of a year. When he hired Mr. Stickley he always felt that he was going to get some good out of him, and it was not altogether a matter of charity. Mr. Stickley was not, of course, as good as a man with two hands; but when there were two men on a job Stickley would make a good extra man. When he put Stickley on watching, he discharged the man doing this work just to give Stickley the position. Mr. Stickley worked in all from May 16 eighteen days. On some jobs he could not take Mr. Stickley on account of his inability to perform the work.

Mr. Dunkle of the Royal Indemnity Company testified that he offered Mr. Stickley work which he refused to accept. He stated that on one occasion he telephoned to Mr. Cavanagh and asked him if he would not take Mr. Stickley back, and he said that if he would come around on Monday he would give him a start. When he told Mr. Stickley what Mr. Cavanagh said, he stated that he would not go to work.

It was agreed that the employee was entitled to fifty weeks' extra compensation for the loss of his fingers, and of this he has received thirty weeks' compensation, leaving a balance to be paid of twenty weeks from July 11, the amount due up to the time of the hearing for seventeen weeks being \$140.25.

It was also agreed that he was entitled to partial incapacity from July 11 to October 17, the amount being \$83.

We further find that on account of his incapacity to work and his inability to secure employment he is entitled to \$8.25 a week from October 17, the date when partial incapacity ceased, for an indefinite period, so that there is due him at the present time, November 7, \$248, his compensation of \$8.25 per week, caused by his incapacity to labor and to secure employment, to continue for an indefinite period, subject to the right of review under section 12, Part III., of the act.

JAMES B. CARROLL.

CHARLES HENRY GRAY, M.D.

E. Barton Chapin dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties Thursday, Feb. 5, 1914, at 2.45 P.M., at the Hearing Room, New Albion Building, Boston, Mass., and affirms and adopts the findings of the committee of arbitration.

The Board finds that the employee, Job Stickley, is totally incapacitated for work by reason of the injury, the evidence showing that he can no longer perform his usual work as a pile driver, or any work that a man of normal physical powers can perform. The employee has endeavored to obtain and has been unable to get any work which the incapacity due to the injury will not prevent him from performing, and has therefore been unable to earn any wages since the time of his injury, except at the position of watchman, which was especially made available for him during a short period of time by his employer.

As a result of the injury, Stickley's opportunity to obtain work has been so narrowed that he has found it impossible to get any employment, the said employee being to all intents and purposes a one-handed man, the injury causing the loss of four fingers of the right hand and reducing him to the position of what may well be termed an "odd lot" in the labor market. He is limited in his ability to perform labor to such special tasks as may be provided through the good will of his employer, or to work which may be specially arranged for him, with a view to making it possible for him to perform it with one hand. Such special form of light work is not available, and during the continuance of his incapacity for work and his inability to earn any wages by reason of said incapacity, the said employee is entitled to the payment of half wages as compensation under the act. (Ball v. Hunt & Sons, Ltd., 4 B. W. C. C. 225; MacDonald or Duris v. Wilsons & Clyde Coal Co., 5 B. W. C. C. 478; Cardiff Corporation v. Hall, 4 B. W. C. C. 159.)

The Board therefore finds that the said employee has been totally incapacitated for work since Oct. 17, 1913, the date upon which the insurer suspended the payment of the weekly

compensation due under the act, and that he is now totally incapacitated for work by reason of the injury received on Dec. 13, 1912, said total incapacity continuing; and that there is due the said employee a weekly payment of \$8.25 during the continuance of said total incapacity, the amount due to Feb. 5, 1914, being \$132; that further payments on account of said incapacity for work are to be continued weekly, in accordance with this finding and the provisions of the act, subject to the right of either of the parties to a review under section 12, Part III., of the statute. The requests for rulings hereto annexed are refused in so far as they are inconsistent with these findings.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

Insurers' Requests for Rulings.

1. Upon all the evidence incorporated in the report of the arbitration committee, the employee is not entitled to full compensation subsequent to May 16, 1913.

2. An employee having recovered sufficiently to return to work is not entitled to full compensation thereafter, provided his physical condition as a result of the accident becomes no worse than it was at the time when he resumed work; provided further that his ceasing work is not due to lack of physical health or strength necessary to perform the labor upon which he was engaged.

3. Under section 10 of Part II. of the Workmen's Compensation Act, so called, the words "able to earn thereafter" refer to physical ability to do any work, and not to ability to secure employment or to ability to do the same kind of work or a similar kind of work to that in which he was engaged before his injury.

4. The fact that an employee, by reason of his injury and of deformities resulting therefrom, is incapable of doing the same kind of work or similar kind of work to that in which he was previously engaged, does not, under the terms of the Workmen's

Compensation Act, constitute total incapacity for work, provided he is physically sound, except in respect to his deformity, and able to do other kinds of work, even though he may not be able to secure such other kinds of work.

5. Provided it is shown that an employee can work, it is not incumbent upon his employer to show that such work can be obtained, and total incapacity ceases even though the workman has tried for work suitable to his then physical condition and has been unable to obtain it.

6. A man who has lost four fingers on his right hand, but who is otherwise in sound condition, and whose hand has healed so as to permit of its performing such work as a hand so maimed could perform, is as a matter of law no longer subject to total incapacity for work under the terms of section 9 of Part II. of the Workmen's Compensation Act, so called, but is entitled only to such partial compensation as will result from deducting the wages which a man in a similar condition might receive for work which he is able to perform from the amount of wages which he had received previous to his injury.

ROYAL INDEMNITY COMPANY,

By its Attorneys,

PEABODY, ARNOLD, BATCHELDER & LUTHER.

CASE No. 422.

MARY ANN OTOT, *Employee.*

HARGRAVES MILLS, *Employer.*

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, *Insurer.*

CHAIN OF CAUSATION BETWEEN PERSONAL INJURY AND INCAPACITY FOR WORK. EMPLOYEE ENTITLED TO COMPENSATION.

The evidence showed that the employee was of frail physique prior to the time of the injury, but that she had been able to perform her usual arduous tasks in a cotton mill for many years. She was then totally incapacitated for work by reason of a fall to the floor of the factory in which she was employed, and totally incapacitated for work thereby for a long period, during which compensation was paid by the insurer. Then compensation was suspended, on the ground that she was no longer incapacitated for work because of conditions due to the injury but by reason of a heart condition having no causal

relation thereto. The evidence showed, however, that there was a complete chain of causation between the personal injury received by her and her present condition.

Held, that the employee was totally incapacitated for work.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Mary Ann Otot *v.* American Mutual Liability Insurance Company, this being case No. 422 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Joseph A. Parks, representing the Industrial Accident Board, chairman, Fernald Hanson, Esq., Granite Block, Fall River, Mass., representing the insurer, and James Tansey, Second Street, Fall River, representing the employee, heard the parties and their witnesses in Aldermanic Chamber, City Hall, Fall River, Friday, Oct. 31, 1913, at 10 A.M.

The only question involved in this case is whether the employee, the said Mary Ann Otot, is now incapacitated for work on account of the personal injury received by her on Sept. 11, 1912, said injury arising out of and in the course of her employment, and compensation having been paid by the insurer until Aug. 27, 1913, when payments were discontinued. The employee received a severe injury to her back by reason of a fall to the floor of the Hargraves Mill, in Fall River, and has not performed any work since the day of the injury. Her average weekly wages were \$9.16.

Dr. Eugene A. McCarthy, in charge of the Orthopedic Department of the Union Hospital, Fall River, Mass., testified that the employee had received treatment there at different times for a period of about a year after the date of the injury. She had a lateral curvature of the spine and a sacroiliac strain, and was somewhat of a neurotic. The strain received as a result of her fall did not do her spine any good, and from the pain she is having at present might be given as a cause for the present trouble. It was a serious question whether or not the

spine would ever be corrected. "She certainly is a neurasthenic, traveling all the time from one physician to another. I absolutely believe the woman is sincere and everything she complains of is so." She had trouble with her spine before the injury, in the opinion of the doctor.

Q. The sacroiliac joint — is that all right now? A. No, she still complains of pain in the lower left-hand side, an indication that the condition is not all right, and caused solely by the accident.

Dr. McCarthy further stated that all the symptoms seemed to point to sacroiliac strain, and to be the cause of the pain she was having.

Dr. John H. Gifford, who examined the employee for the insurer, stated that she had some trouble in the sacroiliac neighborhood, and that she also had mitral regurgitation or lesion of the heart, anemia and retroflexion of the womb. The anemia, shortness of breath and fainting were due to the condition of her heart, and he expressed the opinion that the organic trouble from which she suffered was in no way traceable to the injury.

Dr. Frederick J. Cotton of Boston examined the employee as the impartial physician appointed under section 8, Part III., of the act, and after describing her physical condition states that he finds soreness about the left sacroiliac joint, a slight scoliosis or curvature of the spine just above the pelvis and a slight mitral lesion of the heart. He did not understand why she had not received treatment adapted to strain of the back and sacroiliac region before. He would have put her in a brace of some real solidity in the beginning. He concludes in substance by stating that there is no doubt that the woman is not now able to do anything like hard work, if she ever was. There is no doubt that some small measure, at least, of her disability is due to the accident.

Mary Ann Otot testified that she had always worked for her living, that she was a married woman with two children, and she helped to support the family by working in the mill. She had never lost any work except occasionally, when it was necessary for her to remain at home to sew for the family and perform other necessary household duties. She had never been

sick so far as she could recall, with one exception, when an attack of grippe confined her to her home.

The committee of arbitration is not called upon to pass on any question but that of incapacity for work and the measure of that incapacity. It must decide upon the evidence, which is reported in its material aspects here, whether the employee is totally or partially incapacitated for work as a result of the injury, and state what compensation, if any, shall be paid.

The facts as to the injury and the resulting total incapacity for work are not disputed by the insurer, except as of the date of its last payment to the employee. At that time, to wit, on Aug. 27, 1913, nearly a year after the injury occurred, the insurer claims all incapacity for work ended.

The burden of proof as to the end of the incapacity for work is upon the insurer. (Cory Brothers *v.* Hughes, 4 B. W. C. 291; Proctor & Sons *v.* Robinson, 3 B. W. C. 41; Quinn *v.* M'Callum, 2 B. W. C. 339.)

The weight of the evidence shows that the employee is still totally incapacitated for work as a result of the injury received on Sept. 11, 1912, said total incapacity continuing up to the date of the hearing, the evidence indicating that it will continue for an indeterminate period.

With respect to the claim by the insurer that any incapacity for work which now exists is the result of the condition of her heart, the evidence fails to bring this out. Certainly the evidence of Dr. Gifford is not convincing in the face of the statement made by the impartial physician, Dr. Cotton, that she has only a slight mitral lesion of the heart. As to the sacroiliac strain, we have the evidence of Dr. McCarthy, who states that it was caused solely, in his opinion, by the injury.

The chain of causation connecting the present total incapacity for work of the employee with the injury received on Sept. 11, 1912, is complete. The evidence as presented shows that the employee was of frail physique, but that she had been able to perform her usual arduous tasks in a cotton mill for many years up to the time of her injury. She was then totally incapacitated for work for a long period, and without a question as to the injury being the cause of said incapacity, received compensation regularly for a period of nearly a year. Then,

presumably upon the report of a physician that she was suffering from incapacity due to heart disease, compensation was cut off. There was no evidence to show that the employee had ever been incapacitated for work as a result of any physical weakness. She was able to earn her own living before the injury, but since the injury has not been able to earn any wages.

Upon all the evidence the committee of arbitration finds "that the said employee is now totally incapacitated for work as a result of the personal injury received on Sept. 11, 1912, and that said total incapacity will continue for an indeterminate period; the committee finds that there is due the said employee the payment of a weekly compensation of \$4.58 for an indefinite period."

This decision and all findings regarding compensation or the existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III., of the Workmen's Compensation Act, and the general provisions of said act and its amendments.

JOSEPH A. PARKS.
JAMES TANSEY.

FERNALD L. HANSON dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, Pemberton Building, Boston, Mass., on Thursday, Jan. 1, 1914, at 2 P.M., and affirms and adopts the findings of the committee of arbitration.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 427.

BRIDGET DOLAN, *Employee*.

AMERICAN STEEL AND WIRE COMPANY, *Employer*.

MASSACHUSETTS EMPLOYEES INSURANCE ASSOCIATION, *Insurer*.

EMPLOYEE TOTALLY INCAPACITATED FOR WORK BY ECZEMA
DUE TO HER OCCUPATION AS A WIRE-DRAWER.

The employee was unable to continue her work as a wire-drawer by reason of an attack of irritative eczema, the result of the use of a chemical in connection with her occupation.

Held, that she was totally incapacitated for work and entitled to compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Bridget Dolan v. Massachusetts Employees Insurance Association, this being case No. 427 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of James B. Carroll of the Industrial Accident Board, chairman, Frank P. Ryan of Worcester, representing the employee, and Ira P. Smith of Worcester, representing the insurer, heard the parties and their witnesses at the Committee Room, City Hall, Worcester, on Wednesday, Oct. 1, 1913, at 10 A.M. John W. Murphy, Esq., and Frederick Nolan, Esq., appeared as counsels for the employee and insurance company, respectively.

Bridget Dolan was employed by the American Steel and Wire Company as a wire-drawer at an average weekly wage of \$12.83. The testimony in the case was substantially as follows:—

Bridget Dolan, the injured employee, testified:—

On the eighth day of May, while I was drawing through a piece of wire I tore the skin off my left hand, thus causing an abrasion. My work consisted of pointing the wire on a piece of wood, and pliers had to be used on them. I continued to work from the 8th of May until the 3d of July, at which time the wound had healed up. On the 9th of July I went to the company's doctor. Between the 8th of May and the 3d of July I continued at work, but my hand was bandaged up and the doctor gave me

some salve which I applied regularly. I left the American Steel and Wire Company on the 3d of July and have done no work since. The solution has been changed since I left work. Dr. Rose told me that it was eczema and he sent me to Dr. Everett, a skin specialist. I had a callus on my right hand, and so far as I remember I had no cuts or abrasions on it. I have been under treatment for almost two months. The palms of both my hands have become very tender, too tender to work with at the present time. They are partially healed up. The wrists are not affected. About a month after the eczema appeared on the palm of my left hand, it broke out on my right hand. I have been in the country for six years and have never done any other kind of work except wire drawing. Up to the time of the injury, May 8, I have always been healthy, never needed a doctor, and never had any organic trouble.

An inspection disclosed that the palms of both her hands were affected with eczema.

Prof. Robert C. Sweetzer testified that he examined the solution which the employees of the American Steel and Wire Company use and found that the solution consisted of soap, carbonate, caustic and also some copper from the wire.

William H. Rose, M.D., testified as follows:—

Eczema would not likely come from external conditions. If she had a slight abrasion on her hand it would be possible to get eczema by dipping her hand into the solution, but it is hardly probable. Eczema usually comes from some internal trouble. Sometimes it has organic origin, and sometimes comes from disturbances of circulation or kidney trouble. On July 9 she came to him and he examined her and she has been coming to him every day since that time. He wanted a skin specialist to see her hands and he sent her to Dr. Everett. If Miss Dolan had got this from some internal trouble it would be aggravated by this wire and the manipulation of the pliers. It would hardly be possible to get eczema from the use of these and he had never known a case where this came from external conditions. He could not say when she would be able to work, — perhaps never where this solution would be. It would likely aggravate the skin. At the present time Miss Dolan could not work even if she could secure employment where this solution was not used, because irritation would be caused by using her hands. Eczema on the right hand cannot be contracted from the left hand. All that has been done for her is in the line of external applications.

Edward F. Moore, foreman of the American Steel and Wire Company, testified that Miss Dolan worked for him, and the solution used at the time Miss Dolan was working for the American Steel and Wire Company had not been changed.

The employee was examined by Dr. Fallon, the impartial physician selected by the Industrial Accident Board, and his report is as follows:—

I have examined Miss Bridget Dolan, 19 Edgeworth Street, Worcester, Mass. She says she is a wire-drawer and her work necessitates the use of an "acid liquid" and soft soap; and that her hands are all the time moistened; and that she uses pliers in her work.

She says that previous to last May she had always been perfectly healthy, and had never been troubled with a rash of any kind. The early part of May her hands began to be "sore," and this "soreness" kept growing worse, until finally she had to stop work July 3 because of this. She says the sores are now almost healed, and do not bother her very much.

Examination shows a patch of eczema on the palm of each hand, near the wrist, and partly on the "ball of the thumb." (The patch on the left hand is 2 x 1½ inches; on the right hand, 2½ x 1 inch.) They are now almost wholly healed, and new skin has formed. The patches are reddened, not tender to the touch, dry and are definitely outlined by the old skin.

In the opinion of the subscriber these patches are patches of eczema, — an irritative eczema, — the result of a chemical or of constant moisture of the skin; pressure on these areas of the palm of the hand by the materials used in her work may possibly enter into the causation of the eczema. The areas of eczema are so well defined, and so similarly located on each palm, that the explanation of their causation by means of pressure on a moistened skin seems a plausible one. (If the eczema were wholly due to the ingredients of the liquid or to the constant moisture of the skin, or to both of these combined, the skin of the whole hand would probably be eczematous.)

In the opinion of the subscriber she cannot continue to do the work which she has been doing. The eczema is, however, sufficiently healed to permit her doing work in which there is an absence of irritative influences.

The committee of arbitration finds that Bridget Dolan, the employee, is now totally incapacitated for work as the result of an injury which arose out of and in the course of her employment, said injury causing eczema to appear on the palms of both hands, the eczema being caused by reason of her occupation as a wire-drawer, in which occupation she was required to draw in wire, use pliers and handle a liquid acid solution, her hands becoming irritated and affected with the eczema from which she is now suffering. The committee finds that this eczema was contracted on May 8, 1913, the said employee continuing to work up to and including July 3, 1913, and that she ceased work on account of the incapacity due to the injury

on July 4, 1913. The committee finds that she received an average weekly wage of \$12.83, and that she is entitled to compensation at the rate of \$6.42 weekly from July 4, 1913, to the date of the hearing, Oct. 1, 1913, and that, being now totally incapacitated for work as the result of her injury, is entitled to the continuance of compensation on account of incapacity, in accordance with the provisions of the act.

JAMES B. CARROLL.

FRANK P. RYAN.

IRA P. SMITH.

CASE No. 428.

MASTI E. ETHIER, *Employee*.

JOSEPH G. ROY, *Employer*.

CONTRACTORS MUTUAL LIABILITY INSURANCE COMPANY, *Insurer*.

SPECIFIC OR "ADDITIONAL" COMPENSATION NOT DUE AN
EMPLOYEE ON ACCOUNT OF THE PERMANENT INCAPACITY
OF A PHALANGE. SUPREME JUDICIAL COURT SO DECIDES.

The employee received a personal injury which so injured the first phalange of the left index finger that practically all of the nail had been removed, thus rendering said phalange permanently incapable of use. The only point at issue was whether the employee was entitled to "additional" compensation for the specific injury referred to, Part II., section 11, as amended by chapter 696 of the Acts of 1913, providing for the payment of such compensation "in case the injury is such that the hand, foot, thumb, finger or toe is not lost, but is so injured as to be permanently incapable of use."

Held, that the phalange was so injured as to be permanently incapable of use, and additional compensation was awarded the employee.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to Supreme Judicial Court.

Decision. — The Supreme Judicial Court reverses the findings of the Industrial Accident Board and decides that "additional" compensation is due under the amendment above referred to only when the injury results "in the permanent incapacity for use of the entire finger."

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Masti E.

Ethier v. Contractors Mutual Liability Insurance Company, this being case No. 428 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of James B. Carroll of the Industrial Accident Board, chairman, William H. Grady of Springfield, representing the employee, and Harry R. Elder of Springfield, representing the insurer, heard the parties and their witnesses at the Court House, Springfield, Mass., on Wednesday, Oct. 8, 1913, at 9.30 A.M. Norman F. Hesseltine, Esq., appeared for the insurance company, the employee not being represented by counsel.

The average weekly wage of the employee, Masti E. Ethier, was \$21, his work being that of a carpenter. On the 25th of June he was injured by his finger coming in contact with a jointer, and was incapacitated for two weeks and four days. The first phalange of the left index finger was injured in such a way that practically all the nail had been taken off. The committee of arbitration inspected the finger.

The insurance company called their witnesses.

Dr. Edgar C. Collins testified as follows:—

There is one-half inch of the bone gone and one-quarter inch left. The finger will gain strength. In the cold weather it will possibly be a little more sensitive but nothing to incapacitate him.

Dr. John F. Streeter testified:—

This man came to me on the 25th of June and was discharged July 16 as cured. On examination I found that he had a deep spiral laceration of the terminal phalange of the left index finger, and the nail at that time was completely removed. I treated him through the two weeks and then I saw him occasionally afterwards. I wrote the insurance company he would be able to return to work on the 15th of July, and on the 16th of July I saw Ethier and he stated that he had returned to work. This phalange is not permanently incapable of use. Cold weather will temporarily affect it, but not to the extent that it would be incapable of use. The terminal blood vessels are injured and circulation has to be established, but that takes a short time.

Dr. Ernest L. Davis testified:—

The X-ray picture shows that the articulation between the terminal phalange is intact, and there is a good covering under the bone of a soft tissue, which is the important thing in following amputation. There is

some nail bed left, and a nail will gradually grow up affording some protection. The phalange is not permanently incapable of use.

After carefully inspecting the phalange, and observing the employee's capacity to work therewith, we find that said phalange is so injured as to be permanently incapable of use, and we therefore award the employee compensation at the rate of \$10 a week for a period of twelve weeks, \$120, and in addition compensation at the rate of \$10 a week for four-sevenths of a week, \$5.71, the time he was totally disabled for work, making in all \$125.71.

JAMES B. CARROLL.
WILLIAM H. GRADY.

Harry R. Elder dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, Pemberton Building, Boston, Mass., Thursday, Oct. 30, 1913, at 2 P.M., and affirms and adopts the findings of the committee of arbitration, the insurer being represented by Norman F. Hessel-tine, Esq.

The insurer filed the following requests for findings and rulings: —

1. All the evidence, X-ray plates and prints therefrom be made part of the records for appeal to the Supreme Judicial Court.
2. That the following specific findings be made: —
 - (1) That only three-eighths of the phalange was lost.
 - (2) That the phalange was three-quarters of an inch long.
 - (3) That there was a good covering for the bone, which was the essential part for the use of the phalange.
 - (4) That not all of the nail was gone.
 - (5) That enough of the nail was left so that it would grow.
 - (6) That any numbness was temporary and would pass away.

The said company also requests that: —

3. This Honorable Board rule that, as a matter of law, there is no special compensation provided for the permanent incapacity of a phalange.
4. That these requests be made a part of the record on appeal.

All of these requests are refused, in so far as they are inconsistent with the rulings and findings of the Board.

All of the material evidence is set forth in the report of the committee of arbitration, and the X-ray plates and prints were introduced in evidence.

The phalange was three-quarters of an inch long, one-half inch being severed, and one-quarter of an inch remaining. There was not a good covering for the bone, and only an infinitesimal part of the nail remained, not enough being left so that it would grow again. The numbness was not temporary, and would not pass away. The terminal phalange of the forefinger of the left hand is permanently incapable of use.

The question involved is whether chapter 696, Acts of 1913, amending section 11, Part II., of the Workmen's Compensation Act, applies to the personal injury sustained by Masti E. Ethier, the employee. The insurer admits there is due, on account of incapacity for work, \$5.71.

Section 11 (*d*), Part II., of the act provides that the amount hereinafter named shall be paid in addition to all other compensation: "for the loss by severance of at least one phalange of a finger, thumb, or toe, one-half the average weekly wages of the injured person, but not more than \$10 nor less than \$4 a week for a period of twelve weeks."

Chapter 696, Acts of 1913, amending this section, provides that "the additional amount provided for in this section in case of the loss of a hand, foot, thumb, finger or toe shall also be paid for the number of weeks above specified, in case the injury is such that the hand, foot, thumb, finger or toe is not lost, but is so injured as to be permanently incapable of use."

The Board rules that the amendment provides that the same additional compensation shall be paid for a personal injury which renders a phalange permanently incapable of use and a personal injury which necessitates the severance of at least one phalange, chapter 696, Acts of 1913, applying to and intending to make the same compensation payable under each subsection of section 12, Part II., when a part mentioned specifically in said subsections becomes permanently incapable of use, as if that part had been severed.

The Industrial Accident Board finds that the said employee

received a personal injury arising out of and in the course of his employment on June 25, 1913, and his total incapacity for work ceased on July 13, 1913; that his average weekly wages were \$21; and that there is due the said employee from the Contractors Mutual Liability Insurance Company the total sum of \$125.71, this being twelve weeks' additional compensation, at \$10 a week, \$120, and four-sevenths of a week's compensation, at \$10, \$5.71, on account of total incapacity for work, dating from July 8, 1913, the fifteenth day after the injury.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

Decree of Supreme Judicial Court on Appeal.

BRALEY, J. The first phalange of the left index finger of the employee was so injured that practically all of the nail had been removed, or, as stated in the findings of the Industrial Accident Board, the phalange was three-fourths of an inch long, one-half inch having been severed, leaving only one-quarter of an inch, rendering "the terminal phalange . . . permanently incapable of use." The insurer while admitting its liability for the amount due for incapacity for work, contends that so much of the decree as awards additional compensation because of the nature and permanency of the injury should be reversed. The right to additional compensation rests upon the provisions of St. 1911, c. 751, Part II., § 11, as amended by St. 1913, c. 696. By the original act the insurer must pay at the rate specified "for the loss by severance of at least one phalange of a finger, thumb or toe," and by the amendment, the same amount is to be awarded "in case the injury is such that the hand, foot, thumb, finger or toe is not lost, but is so injured as to be permanently incapable of use." The amended statute, if given the most liberal interpretation, contains no reference to the permanent incapacity of an injured phalange, and under the finding of the Board, which was warranted by the evidence, a construction cannot be adopted placing upon a parity the

severance of a phalange with an injury to the phalange not resulting in the permanent incapacity for use of the entire finger. It follows that the decree must be modified by the omission of the award "for twelve additional weeks' compensation," and when so modified it is affirmed.

So ordered.

CASE No. 431.

FRANK LEVERONI, ADMINISTRATOR OF ESTATE OF ROCCO FUMICIELLO, *Employee.*

LATHROP & SHEA COMPANY, *Employer.*

TRAVELERS INSURANCE COMPANY, *Insurer.*

FATAL INJURY TO EMPLOYEE WHICH OCCURS ON RAILROAD TRACKS AFTER WORKING HOURS NOT COVERED BY THE STATUTE.

The employee lived at a certain boarding house and was compelled by reason of this fact to go to and from his place of employment by means of the railroad track. On the day of the fatality he had finished his work and was proceeding on his homeward way when he was hit by a train and killed. It was not shown that it was a part of the contract of employment that the employee should live at this boarding place and go along the railroad track to get to and depart from his work.

Held, that the injury did not arise out of and in the course of his employment.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to Supreme Judicial Court.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Frank Leveroni, Administrator of Estate of Rocco Fumiciello, *v.* Travelers Insurance Company, this being case No. 431 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of James B. Carroll of the Industrial Accident Board, chairman, Albert B. Fopiano, Tremont Building, Boston, Mass., representing the dependents of the employee, and William C. Prout, 60 State Street, Boston, Mass., representing the insurer, heard the parties and their witnesses at the rooms of the Industrial Accident Board,

Boston, Mass., on Friday, Oct. 10, 1913, at 10 A.M., Wednesday, Feb. 25, 1914, at 4.30 P.M., Thursday, March 19, 1914, at 9.30 A.M., and Thursday, April 2, 1914, at 9.30 A.M. Frank Leveroni, Esq., of Boston appeared for the dependents of the deceased employee, and Louis C. Doyle, Esq., of Boston appeared for the insurer, as counsels.

By agreement of the parties the hearing was held in Boston, Mass., instead of Middlefield, Mass., where the injury occurred.

Rocco Fumiciello was employed by Lathrop & Shea, who were doing some contract work for the Boston & Albany Railroad near Middlefield, Mass. Fumiciello, the employee, lived about one mile west of where he was employed, and it was necessary for him to pass over the tracks of the Boston & Albany Railroad to go from his work to his home. On the night of Sept. 3, 1912, he was last seen between 7 and 8 o'clock, at or near the track of the Boston & Albany Railroad. He was then going in a westerly direction toward his home from his work. The following morning his body was found about 300 yards in a westerly direction from where he worked and about one-quarter of a mile east from where he lived.

The question in the case is whether his injury arose out of and in the course of his employment. The evidence was substantially as follows:—

Harry McCaul of Chester, Mass., testified:—

I knew Fumiciello to speak to. We would meet on the track when he was going up and down to his work. My work is flagging for the Boston & Albany Railroad on the main line from Middlefield and Chester on the new cut. I should say I had met Fumiciello about one and one-half years. On the evening of the accident he passed right by and I was standing at the door of my shanty. He said, "Good evening," and I said, "Good evening." He was on his way home from work between 7 and 8 o'clock. Taking it down the track, it was probably a matter of 300 yards from where he worked to where he was found. He was found on the banking. Middlefield is the next station west of Chester, and you do not get to the grade until you get to Washington. The shanty was about 100 feet north of the track. To get from the shanty to the track he had to cross lots. To go home he might go through the woods or through the cut if it was daylight, but I would hate to go through it at night. It is no place for a man to go at night and no man ever went there. At that time there was no beaten track in the woods. The men always came around by the Boston & Albany main line. Fumiciello lived with this

man Canimeno and boarded with him at Middlefield. His house was only a matter of 75 or 150 feet from the main line. It was one-quarter mile from where he was found to where he lived. There is no possible way that he could get to his home without going on the main line unless he swam the river. The only reason I can give for the accident is that he heard the train coming upon him and stepped over to avoid it. Shortly after I saw him a train came up the track and a little later one came down. Fumiciello was going west, and from where he was found, it must have been the east-bound train that struck him. It was dark when he went by my shanty.

Joe Canimeno of Middlefield testified:—

I worked along the track on the same job as Mr. McCaul. I have been working for the Boston & Albany Railroad about two years. Fumiciello lived in my house three or four months, but I knew him five or six months before. I did not know him in Italy. He was married, and he said he had five children. His wife and he wrote back and forth to each other, and he sent her money all the time. About ten or fifteen days before he died he had sent her some. I think he sent this money from the Middlefield post office. Sometimes he got through work at 6, 7 or 8 o'clock. I first heard of the accident the next morning. When he did not come home that night, I thought perhaps he was at the shanty doing extra work and found it so dark would not come home. I cannot tell how much he contributed to his wife.

On this evidence we find that on Sept. 3, 1912, Fumiciello left his work to go to his home, and while walking along the tracks of the Boston & Albany Railroad he was hit by a train and killed. It was necessary for him to go over the tracks of the railroad in order to get to his home. He left a widow, Rose Fumiciello, who was wholly dependent upon his wages for support. Following the case of *Holmes (or Holness) v. MacKay & Davis*, 1 W. C. C. 13, we feel constrained to rule that the administrator is not entitled to compensation, for the reason that the injury to the employee did not arise out of and in the course of his employment.

JAMES B. CARROLL.
WILLIAM C. PROUT.

Dissenting Opinion.

I dissent from the opinion of the majority of the committee. I find that the case of *Holness v. MacKay & Davis* cited by the majority differs materially from this case. In the case of

Holness *v.* MacKay & Davis, Lord Justice A. L. Smith, who found that the injury to the employee did not arise out of and in the course of his employment, stated in his opinion *that it was no part of the contract of employment that the deceased should go to his work by one particular way.* That there were *two* ways by which the deceased might have gone to his work. One was by the Waterloo Gate, in which case it would not have been necessary for him to go upon the main line. Evidence was offered, also, to show that the deceased was told by his foreman to use the Waterloo Gate, which was more convenient for the deceased.

It therefore clearly appears that in the case of Holness *v.* MacKay & Davis the deceased was upon the main line as a trespasser and in expressed disobedience to the orders received from his foreman. In the case at bar it was *part of the deceased man's contract for services that he should go to work by one particular way, along the said railroad track,* for it was the *only* way that he could get to his work. In this case the risk of being struck by a train was one incidental to his employment, and a special risk to which the general public was not exposed, and must have been contemplated by the contractors.

"An accident arises 'out of' the employment when it results from a risk incidental to the employment as distinguished from a risk common to all mankind." (Pierce *v.* Provident, etc., Co., 1911, 1 K. B. 997.)

"There was a causal connection between the injury to the deceased and the conditions under which the employer required the deceased to work. The injury had its origin in a risk connected with the employment, and it flowed from that source as a natural consequence." (McNicol *v.* Patterson, Wilde & Co., 1913, 215 Mass. 497.)

The contention of the employers that the deceased was injured by a train of the Boston & Albany Railroad over which the employers had no control has been carefully considered by the court in Bryant *v.* Fissell, 86 Atl. 458, N. J. 1913. In Bryant *v.* Fissell the deceased was employed by the defendant as a carpenter. He was killed while at work by reason of a heavy bar falling on his head from one of the upper stories of the building at which he was working. The defendant con-

tended that there could be no recovery because the bar which killed the deceased was "caused to fall by a workman of an independent contractor doing work on the same building."

The court says: —

We conclude, therefore, that an accident arises out of the employment when it is something the risk of which might have been contemplated by a reasonable man when knowing the employment as incidental to it.

In this case I find that the risk of being struck by a train going to or returning from work was a risk which might have been contemplated by a reasonable man when knowing said employment as incidental to it.

I therefore rule that the administrator is entitled to compensation for the reason that the injury to the employee did arise out of and in the course of his employment.

ALBERT B. FOPIANO.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room of the Board, New Albion Building, Boston, Mass., on Thursday, June 25, 1914, at 9.30 A.M., and affirms and adopts the findings of the committee of arbitration.

The report of the said committee states all the material evidence, and shows that the employee, Rocco Fumiciello, after completing his work for the day, entered upon the railroad of the Boston & Albany Railroad and was hit by a train and killed. It was necessary for him to use the railroad tracks in order to go to and from his place of employment. His widow, Rose Fumiciello, was wholly dependent upon him for support at the time of the injury.

The attorney for the dependent widow relies, in support of his claim for a review, upon the Sundine case, reported in *Banker & Tradesman*, Vol. XLIX., No. 23, June 6, 1914.

In the Sundine case, however, the employee was leaving her place of employment during the noon hour, and in so doing

was making use of a stairway that was common to all the tenants, having been specially prepared as a way of going and coming from the different floors of the building. It was a part of the contract of the landlord with the lessee to provide this common stairway, and it was under the control of the said landlord.

In the case before us, if the widow is entitled to recover, every employee who is obliged to pass over the railroad to and from his home, although the distance might be considerable, would be entitled to compensation. While this employee was obliged to use the railroad in going to and from his home, the railroad and its operations were not under the control of his employer, and said employer could not in any manner direct the operations of the cars and engines thereon. If the subscribers, Lathrop & Shea, had a contract to build a portion of the State highway, and it was necessary for the employee, Fumiciello, to use said highway to go to and from his home, and he was injured by reason of an automobile running over him, it could not be maintained that the employee would be entitled to compensation. The care and responsibility of the employer might well extend to the stairway or passageway, as in the Sundine case, where it would be beyond the scope of the Workmen's Compensation Act to extend that same responsibility so as to make the employer liable for personal injuries occurring upon a railroad whose management and control were not vested in him.

It was not shown that it was a part of the contract of employment that the employee should live at this boarding place and go along this stretch of track to reach the scene of his employment. The case does not seem to come within the principle of those in which an employee is injured while going to and from his work in a conveyance supplied by his employer for that purpose, the use of this conveyance being implied in the contract of employment. Nor is it within the principle of those cases where the use of the common hall or stairway by the employee is fairly within his contract of hire. (*Holness v. MacKay & Davis*, 1. W. C. C. 13.)

The Board finds, upon all the evidence, that the personal injury received by the employee, the said Rocco Fumiciello,

did not arise out of and in the course of his employment, and that no compensation is due the widow, Rose Fumiciello, under the Workmen's Compensation Act.

JAMES B. CARROLL.

DUDLEY M. HOLMAN.

EDW. F. MCSWEENEY.

CASE No. 433.

BRIDGET BURNS, WIDOW OF JOHN J. BURNS, *Employee*.

WILLIAM COULTON, *Employer*.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *Insurer*.

SUPREME JUDICIAL COURT DEFINES SERIOUS AND WILLFUL MISCONDUCT ON THE PART OF THE EMPLOYER; DECIDES THAT PARALYSIS OF LOWER LIMBS, DUE TO INJURY TO SPINAL CORD, ENTITLES EMPLOYEE TO "ADDITIONAL" COMPENSATION; THAT SAID "ADDITIONAL" COMPENSATION CEASES AT DEATH. PROXIMATE CAUSE OF DEATH IS SEPTICÆMIA HAVING CAUSAL RELATION WITH INJURY. THIS IS A PERSONAL INJURY COVERED BY THE STATUTE.

The employee received a fatal injury by reason of the collapse of the staging structure which had been used in erecting an ice house. He had been instructed to go to work underneath the platform and remove nails from the braces as they were taken off. Fifty men were employed on the job, and the employer had direct charge of the work, with no intermediary or assistant to aid him in his supervision of the men and their work. The structure collapsed and the employee was found underneath it. He sustained a fracture of the spinal column which caused paralysis of the lower limbs and permanently incapacitated them for use. Death occurred several months later from fracture of the spine, with a complication of septicæmia, resulting from an extensive bed sore, the connection between the personal injury and the fatal termination thereof being conclusively established. The dependent claimed double compensation, alleging serious and willful misconduct on the part of the employer, and asked that the balance of the "additional" compensation on account of the permanent incapacity of both legs be awarded her. The insurer claimed that it was not liable because the proximate cause of death was septicæmia and not the injury, and also asked the committee to rule that no "additional" compensation was due the employee prior to his death.

Held, that the injury was not caused by the serious and willful misconduct of the subscriber; that the employee was entitled to "additional compensation" on account of the permanent incapacity of both legs to the date of his death; that the dependent widow was entitled to compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to Supreme Judicial Court.

Decision. — The Supreme Judicial Court affirms the findings of the Industrial Accident Board.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Bridget Burns, widow of John J. Burns, v. Fidelity and Deposit Company of Maryland, this being case No. 433 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Edward F. McSweeney, of Boston, Mass., chairman, representing the Industrial Accident Board, George P. Beckford, Esq., 53 State Street, Boston, Mass., representing the employee, and Addison Goldsmith, Esq., 14 Park Road, Winchester, Mass., representing the insurer, heard the parties and their witnesses in the Selectmen's Room, Town Hall, Wellesley, Mass., on Saturday, Oct. 4, 1913, at 10 A.M.

This being a case in which serious and willful misconduct on the part of the employer, as provided in section 3, of Part II., of the Workmen's Compensation Act, is involved, the employer, William Coulton, agreed in writing to the nomination by the insurance company of Mr. Addison Goldsmith as the arbitrator representing the insurer in this case.

The appearances were as follows: John A. McCaig, Esq., for the employer, John E. Reagan, Esq., for the employee, Albin L. Richards, Esq., for the insurer.

From the evidence it appears that John J. Burns was employed as a laborer by William Coulton, who had the contract to build an ice house at Wellesley for the Boston Ice Company, and was insured by the Fidelity and Deposit Company of Maryland.

It appears that this ice house was a structure 288 feet long and 182 feet wide, divided into ten sections or bays, each section being numbered and separated from the other. A staging about 30 feet high, with a top platform on which the men worked, 25 feet from the ground, and another 15 feet from the ground, was being taken down. Coulton had about 50 men employed on this job, and looked after all the details of superintendence himself, having no foreman directly responsible as such for the supervision of the work.

It appeared from the testimony of Terence William Maguire, — who was hired for a blacksmith, but, there being no blacksmithing to be done there, was working as a carpenter's helper — that work to remove this staging structure had begun on the Saturday preceding the date of the accident, and on coming to work Monday morning practically all the men working in ice house No. 1 continued the work of taking down the platform. Maguire testified that he was working on the top of the platform and saw an Italian, whose name he does not know, and who is not now working for Coulton, come along with a sledge hammer and knock away from the bottom the diagonal braces supporting the structure. When Maguire began to feel the staging shake, he called to this Italian and remonstrated with him, saying he wanted to cross, asking him if he thought he was a bird, to cross without any supports. He testified that five minutes before the accident he saw Coulton in the room. Coulton has a very loud voice and he heard him ordering the men to take the staging down section by section, and to be "damn careful about it."

Q. You say you heard Coulton instructing the men to take down one section at a time? Was that order followed by the men? A. We were starting to follow it.

There was practically no disagreement in the testimony of any of the workmen, whether called to testify by the employer, Coulton, the insurance company, or the counsel for the injured man. All the testimony was to the effect that the staging had been properly erected, and that Coulton had ordered it taken down section by section, and this was the proper way to do this work.

Daniel McDonald testified: —

The side cross boards had been removed at the time.

Q. So this staging stood in the middle of house, unsupported other than by these ledger boards around the side of it? A. Yes.

Q. How long did it take to remove those supports to the uprights? A. Took about — an hour and a half I guess we worked at it.

Q. Mr. Coulton set you to work doing that particular kind of work? What did Mr. Coulton set you to work to do? A. Did not set me to work doing anything particular any more than the rest.

Q. What was that? A. Taking off the braces.

Q. I take it you had been working at that something over an hour at the time the accident happened? A. Something over an hour.

Archie McDonald testified: "The braces were used to hold up the staging, make it solid." He did not know how long they had been taking down those braces. He was there an hour and a half before it happened. "They were taking down braces and plank all the time. Some braces."

All the witnesses were in agreement that a ledger board on each side, which was the horizontal brace connecting the various sections of the platform, was in place. One witness, Daniel McDonald, called by the counsel for the injured employee, testified that he was working on this staging up to three minutes before it fell; he felt no tremors or shaking; he got down, not because he was afraid of the stability of the structure, but because he wanted to get a drink. When he came down witness said he could not remember whether or not any braces remained up; "if there were I probably would have remembered them." He testified that in his opinion, as a carpenter, the manner the staging was erected and the way it was being taken down by the employer, Coulton, was the proper method to pursue in these cases; he could not find fault or suggest any improvement in the construction or the method of taking down this structure. He also remembered that Coulton had come into house No. 1 a short time before the accident, and gave some orders referring to the method of taking the staging down, but other than to have the impression that Mr. Coulton's orders were concerned with taking down the staging he could not testify, exactly what Coulton had said. Coulton was right underneath witness, who was on the staging knocking off braces.

Other witnesses, workmen employed by Coulton, corroborated the testimony of Coulton's giving the order, and as to the condition of the structure.

Burns, with at least one other man, when they arrived at work in the morning, was told to go under the platform structure and knock nails out of the braces as they were taken off the staging.

There was no testimony as to exactly how the accident occurred. It appears that the support at the extreme end of the platform was composed of two 4 by 8 timbers, joined by ledger boards, 2 by 6. These timbers on the ends gave way and falling struck against the next supporting similar timbers, 15 feet distant, and these in turn struck others, and the whole thing toppled over, as described, like a "house of cards." When the structure fell, Burns was underneath. Burns, when he was found, had a heavy timber on his stomach, which caused a fracture of the spinal column, resulting in complete paralysis of the lower limbs. He was taken to the Morse Hospital, in Natick, where he was treated for about six weeks, afterward being taken to his home.

As the result of his injuries Burns was left for the balance of his life a hopeless cripple, with no motion in his limbs below his waist. On being sent from the hospital to his home Dr. Burke, his attending physician, found he had developed while in the hospital the beginnings of "bed sores," which were treated, but finally produced septicæmia, the immediate cause of his death, which occurred on Sept. 30, 1913.

Dr. Michael Francis Burke testified substantially as follows in regard to Mr. Burns' injuries: —

The injuries received by Mr. Burns were multiple. I should say that the chief injury in his case was a fracture of the spine about the region of the twelfth dorsal vertebræ, which caused a complete paralysis of the body below the seat of fracture, and he sustained other internal abdominal injuries, which cleared up in the course of a short time and did not leave any lasting effect, but his principal injury was a fracture of the spine, with injury to the spinal cord, so extensive that he lost complete use of power and sensation below the seat of injury. The injury did affect the nerves through the laceration of the spinal cord, which resulted from the fracture of the bone. The injury to certain nerves would make the lower limbs incapable of use, without injury to the limbs themselves. There was no external evidence of injury to the limbs themselves, as I remember it. When the man entered he was in such a critical condition that we despaired of his life to such an extent that we did not disturb him very much for a few days. There might have been slight injuries to the lower limbs which we did not discover at the time. There was no impairment of circulation in lower limbs. It was all nerves, due to the injury of the spine. Would say we operated later on him and found that the spinal cord was fractured and we found laceration of his spinal cord, which would cause all his symp-

toms, — not to be remedied; not benefited at all by operation. The injury resulted in a complete loss of use of lower limbs. This injury caused loss of use of lower limbs. John J. Burns was totally incapacitated for work, resulting from the injury he received, from time of injury up to time of his death. He died September 30, about 12.30. The cause of his death was fracture of the spine, with a complication of septicæmia, resulting from an extensive bed sore. By that we mean poisoning. His system became poisoned and he gradually failed, the result of an extensive sore developed on his back, I should say due to the fact that he was obliged to lie in one position.

Q. Did it arise out of injury? Was there a causal connection between this bed sore and his going to bed after this accident? A. It is a condition that might arise in any condition in which he would be compelled to lie in one position on his back. He was compelled to lie in bed on account of fracture in his back. Should say there was a direct connection between his lying in bed on his back and injury he sustained. The bed sore was the result of his being in bed, because he was injured while in the course of his employment, and that death resulted from the injury, I should say. I should say bed sore caused a general condition of his system, which on top of the poor condition he was already in from fracture of the spine, together, was cause of his death. There was a gradual decline from the time of his injury until his death, and shortly before his death he developed symptoms which I ascribe to the toxic poisoning from his sloughing sore on his back, which hastened gradual decline and caused his death.

Q. Can you trace a connection between lessened resistance, due to a spinal-cord injury, and to a susceptibility to septicæmia, such as happened in this case? A. I think so. I should say the injury to his spine lowered his vitality to such an extent that a sore of this kind could develop more easily, and that the results of such a sore would be more disastrous. The sore was below seat of fracture, some 8 or 10 inches; was on prominence of his lower spine. The injury to back was in dorsal region, higher up. As a result of the injury he was confined to his bed.

Q. And that the death resulted from the injury? A. I should say so, yes, sir. The septicæmia was a factor in the cause of death; I should say it was not the entire cause, — was the last straw, so to speak; that was my idea, — added to his other causes. He would have lived longer if he hadn't had the septicæmia. The septicæmia was the exciting cause, I should think. The septicæmia was due to infection, something that got into his blood, like blood poisoning, and the blood poisoning got into his system through this bed sore, which was 6 or 8 inches away from the place where he was struck on his back, and which was due to his lying in bed. He was obliged to lie in bed as a result of the injury, — the injury he received from accident. After he left the hospital I went on a short vacation for a couple of weeks, and he was in the charge of another physician, Dr. T. J. Maguire, Natick. After I returned I saw him at irregular intervals, sometimes every day, sometimes once in two or three days, until

time of his death; the latter days I saw him every day. I should say off-hand I saw him every day for four or five days before he died. The reason I didn't see him every day was the fact that we had a district nurse calling on him, who dressed his wounds as well as I could have done. I saw her there at house, — never saw her in the act of dressing the wounds. Should say perhaps two or three times she happened in as I was there, — that would be the entire time I saw him at his home; she called a great many times, of course, when I didn't happen to be there. His family told me as to what went on when I was not there.

Dr. Burke said Mr. Burns "left the hospital about the middle of August and he died the 30th of September, and I returned from my vacation the Tuesday after Labor Day, that was September 2. We noticed bed sore after he came from the hospital, — a discoloration which gradually spread and required more or less surgical treatment; that is, I had to remove a great deal of this dead necrotic tissue with forceps and scissors, trimming it away gradually. A bed sore is a good deal the same condition of the tissues as you would get with gangrene; that is, a loss of nutrition in the parts, due to the constant pressure of lying in one position; necrosis or death of the parts takes place, — gangrene, you might say. This gangrenous tissue must be removed in order to produce a healthy condition for tissues to heal. As soon as we discovered the sore, this necrotic tissue, as I say, was removed, piece by piece, as it softened sufficiently to allow of its removal, and then the wound was treated with antiseptics, — creolin, peroxide, hydrogen and alcohol, — antiseptic dressings were applied; every few days, as this gangrenous tissue softened, it was trimmed away with the scissors, until the time of his death. Should say this bed sore started in the hospital, but it was not discovered until he came home. Should say it had been going on a considerable length of time; that is, the tissues showed the blackened and necrotic condition at that time. Might have been going on gradually from onset of his illness. I should say that it started the beginning of his illness; going on practically ever since he was in the hospital." This bed sore was never called to his attention at the hospital. He should say that would be a matter that the nurses would have charge of. The proper treatment for the avoidance of a bed sore would be the removal

of the pressure as far as possible from this special area, and in addition to that, hardening of the tissues, as far as possible, by certain applications to the skin; turning the patient and rubbing his back with alcohol is a common thing. Didn't feel it was wise to disturb patient in this case to turn him. They arranged at the hospital a special bed for him; that is, he was suspended in a sort of hammock arrangement, so that he could be raised and lowered, and various things done for him that were necessary, without disturbing him to any great extent. "We have rubber cushions; don't know whether they were used in his particular case or not. I should say everything was done for him that could have been done. Dr. Mixter of Boston operated on him; I assisted at the operation." That assuming that he had continued to live from month to month, year to year, he should say he never would have recovered the use of his lower limbs. That as far as he knew, everything was done for him. He did not know of anything not having been done for him. As far as he knew, he might have had these rubber cushions and applications for the prevention of this bed sore. He couldn't say positively whether he had them or not. "Those are details we leave to the hospital superintendent. The history of those cases is that they do die from the injury. The period varies more or less. They are usually carried away by some intervening disease; the vitality is lowered so that a great many of them are subject to pneumonia. Others are carried away by bladder trouble, which is the secondary consequence of this condition. They develop a septic condition of the bladder and die of kidney trouble, — uremia. The vitality is lowered to such an extent that usually some intervening disease carries them away." He should say that this man's end was hurried by septicæmia. "I should say in this case there are two causes, the proximal and the remote cause. The proximal cause of his death was the septic condition resulting from his back, and the remote cause was the general debility resulting from his injury."

Q. (by Mr. Reagan). You would still say that injury caused the death?
A. Yes.

Dr. William C. Mackie, Coolidge Street, Brookline, testified he was now associate medical examiner of Norfolk County, had had that position since last March; had investigated probably 8 or 10 death cases. He had made an examination of Mr. Burns, the deceased in this case. Saw him twice at the hospital. Dr. Burke was present at one time; told him to go ahead and look the patient over. The second time Dr. Burke was not there, but he looked at him through Dr. Burke's permission. He should say Mr. Burns' death, as Dr. Burke states, was due to septicæmia; should say that is an entirely different thing from fractured spine; that a bed sore usually comes from lying in bed; that there was no occasion for a bed sore; it simply means that some one is negligent; that this man was in the Morse Hospital in Natick; that the bed sore did not develop in the first two weeks; that the immediate cause of his death was septicæmia; that it was perfectly possible that Mr. Burns' vitality was lowered and he could get an infection of that kind, and take it up, perhaps, much easier than a person in normal health; that a bed sore was a thing that could be avoided if the proper means and precautions were taken.

The issues in the case are:—

1. That the injury was due to the serious and willful misconduct of his employer, Coulton.
2. That Burns' death was not due to the injury and, therefore, did not arise out of it.
3. To what extent, if at all, do the additional payments provided in section 11 of Part II. of the Workmen's Compensation Act, as amended by chapter 696, Acts of 1913, apply in the case?

Regarding serious and willful misconduct, it appeared from the evidence of two of the witnesses that these witnesses, with others amounting to 8 or 9 to a gang, had been, since going to work that morning at 7 o'clock, engaged in knocking off braces, and that at the time of the accident all the braces which ran from one section to another had been knocked off, and that the only thing that sustained the staging was a ledger board. It further appeared that from 7 o'clock to within about five minutes of the accident the employer had been in or about the

room where the accident occurred; that he had stood beneath the staging upon which one of the witnesses, who testified, says he was standing knocking off braces; it further appears that the employer himself set the injured man, Burns, to work knocking nails out of braces, and that more were engaged in knocking nails out of braces when the accident occurred. None of these facts were denied by the employer, although he testified.

The arbitrators find that the staging was apparently well built, and that shortly before the accident occurred Coulton had given directions, which were heard by some of the employees, that the staging should be removed carefully, section by section, which is agreed to be the proper way to do it. It appears that Coulton had set the gang of 15 or 16 men at work at 7 o'clock on the morning of the day of the accident, taking down this staging. Some of the men were set to work knocking off braces from the time of going to work to within two or three minutes of the time of the accident, and at the time of the accident an unknown number of diagonal braces which ran from one section to the next along the sides of the staging had been removed so that the staging was supported substantially by a ledger board on each side. Coulton had been in and about room or bay No. 1 much of the time from 7 o'clock to within five minutes of the happening of the accident, and at one time he stood in the room directly beneath where one of the witnesses was standing knocking off braces. About fifteen or twenty minutes before the staging fell Coulton had called Burns from work outside the ice house, directing him to get a hammer and take the nails out of the lumber which the employees were knocking down, and at the time of the accident Burns was on the ground beneath the staging taking nails out of the braces. Coulton personally attempted to superintend and direct this work without any foreman, vested in his absence from the job, or any section of it, with the responsibility of superintendence. This accident is due to Coulton's failure closely to supervise the removal of the structure at all times.

Coulton testified that a general removing of the diagonal braces would be a dangerous manner of taking down the staging, because if this was done the structure would be in

danger of collapse. It was clearly Coulton's responsibility to see that nothing was done to endanger the life and limb of his workmen; but the picture left in the minds of the arbitrators after hearing the evidence in this case is that of a contractor taking a large job, employing no assistants vested with power to enforce his commands, hastening personally from one part of the job to another, giving proper orders, and then depending upon the intelligence of his workmen, part of whom understood little or no English, to carry out these orders carefully, and with due regard to the safety of their fellow employees.

The evidence shows that the staging was built carefully; it is obvious that this was the profitable thing for Coulton to do; but when the work for which the staging was built was completed, the quicker the staging was removed the better, from the viewpoint of the contractor's profit, and so workmen were allowed to remove braces, under general orders, but without supervision, until the structure was so weakened in every part that it gave way, killed one workman, maimed another for life, and injured others more or less seriously.

Considering the dangerous result of this attempt to save money, this is undoubtedly serious misconduct, but there is no evidence that any workman engaged on the job protested that the weakened condition of the structure was dangerous; in the absence of any evidence on this point, while Coulton should have known it was dangerous, the element of willfulness does not appear, and the serious and willful misconduct contemplated by the act, and as defined by the various decisions under the English law, is not shown in this case, and the arbitrators so find.

Regarding the claim of the insurer, that Burns' death is not due to the injury because it did not arise out of and in the course of his employment, the arbitrators find that Burns was injured on Monday morning, July 21, 1913, at 8.30 o'clock; he was taken to the Morse Hospital, in Natick, and later to his home; as a result of this injury he was paralyzed from the waist down, and because of it he was necessarily obliged to remain permanently in one position, developing the "bed sores," which brought about the blood poisoning which ended in his death. The arbitrators believe that there is a direct

causal connection between the death and his injury on July 21, and that the septicæmia from which he died was directly connected with the injury which he received, and so find. The insurer is therefore obligated to pay Burns' reasonable medical and hospital service bills for the first two weeks from the date of the injury, and total disability compensation at the rate of one-half of his average weekly wage of \$13.50 per week, or \$6.75 per week, up to the date of his death; that is, eight and one-seventh weeks' compensation, or \$54.96, which is due to his estate.

Regarding the additional payments provided in chapter 696 of the Acts of 1913, amending section 11 of Part II. of the Workmen's Compensation Act, the arbitrators find that the insurer is obligated to pay to Burns, for the permanent loss of use of both legs from the date of injury up to the date of his death, Sept. 30, 1913 (said additional payments to cease at the date of Burns' death), at the rate of one-half of his average weekly wage of \$13.50 per week, or \$6.75 per week; that is, ten and one-seventh weeks' additional compensation, or \$68.46, which is due to his estate.

The arbitrators find that Bridget Burns, the widow of John J. Burns, living with him at the time of his death, was totally dependent on him, and is therefore entitled to receive an amount equal to one-half of Burns' average weekly wage of \$13.50 per week, or \$6.75 per week, from the date of his death, Sept. 30, 1913, for a period of three hundred weeks, less eight and one-seventh weeks during which Burns was, previous to his death, entitled to total disability compensation of one-half of his average weekly wage of \$13.50 per week, or \$6.75 per week; that is, two hundred and ninety-one and six-sevenths weeks' compensation, or \$1,964.25.

EDW. F. MCSWEENEY.

I agree with the findings of fact in the report in so far as they go, but feel that in addition to what has been found we should also find, and I do here find, that in view of the fact that Coulton set men to work knocking off braces, was in the room while they were knocking off braces and set injured to

work knocking nails out of braces, that he knew that the braces were being knocked off the whole staging. I disagree with the finding of law which says that this was *not* willful misconduct, and find that as the employer knew the men were knocking the braces off and knew this was a dangerous manner of taking down the staging because of the danger of collapse, — that allowing this to be done, and knowing it was being done was willful misconduct.

I agree with the chairman as to the cause of death of the said John J. Burns, which was that his death resulted from the injury. Regarding the additional payments provided in chapter 696 of the Acts of 1913, amending section 11 of Part II. of the Workmen's Compensation Act, I find that the said injury resulted in the permanent loss of the use of both legs of the said John J. Burns, and that his legs were permanently incapable of use. I believe that this is a penalty in addition to all other awards made under the act, and that therefore the insurer and employer are obligated to pay, in addition to the amount to be paid for total disability and death, one-half of Burns' average weekly wage of \$13.50 per week, or \$6.75 per week, for one hundred weeks, which, as the injury was caused by the serious and willful misconduct of the employer, should be doubled, all of which is due to his estate or legal representatives. I find that Bridget Burns, the widow of John J. Burns, was living with him at the time of his death and was totally dependent upon him, and is entitled to receive the amount specified by the chairman of the board of arbitration, except that, as I find this accident was caused by the serious and willful misconduct of the employer, the amount of compensation should be doubled, as provided by statute.

GEORGE P. BECKFORD.

Dissenting Opinion.

I, Addison Goldsmith, one of the arbitrators in the above entitled case, dissent from so much of the said opinion as awards any money or compensation to the estate of John J. Burns, for the reason that the administrator of his estate is not a party to this proceeding.

I also dissent from that part of the report which awards additional compensation to the estate of John J. Burns under chapter 445 of the Acts of 1913, for the reason that there was no injury to the legs which caused any disability of the legs, the disability of the legs being in fact wholly due to the injury to the spine, which caused total disability of the whole body, and the compensation for which injury to the spine includes all compensation for disability resulting from that injury, including the disability of each and every member; and I also dissent from that part of the report which finds that the injury to the spine caused the death of John J. Burns, for the reason that it appears to me to be established by the testimony that although the injury was a remote cause of Burns' death, the proximate cause of his death, which is the only cause that the law can consider as a cause, was septicæmia, due to a bed sore, which bed sore was the result of neglect on the part of those having the care of Burns to take the precautions reasonably necessary to keep his body, in places where it was subject to pressure as a result of his lying in bed, in a healthy condition.

ADDISON M. GOLDSMITH.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room of the Industrial Accident Board, Pemberton Building, Boston, Mass., on Thursday, Nov. 20, 1913, at 10 A.M.

John A. McCaig, Esq., appeared for the employer, William Coulton, Albin L. Richards, Esq., for the insurer, and John E. Reagan, Esq., for the widow, Bridget Burns.

After the hearing before the committee of arbitration and before the hearing on review, an administratrix for the estate of John J. Burns had been appointed, to wit, Bridget Burns.

The Board finds, upon the evidence introduced before the committee of arbitration, that the employee, John J. Burns, received a personal injury arising out of and in the course of his employment, by reason of the collapse of the staging structure which had been used in erecting an ice house for the

Boston Ice Company at Wellesley, Mass. The ice house was 288 feet long and 182 feet wide, the staging being 30 feet from the ground at its highest part, with a top platform 25 feet from the ground and another platform 15 feet from the ground. Fifty men were employed on the job, and William Coulton, the employer, had entire charge of the work, having no intermediary, or assistant, to aid him in his supervision of the men and their work. The ice house had been erected, and it was while the men were engaged in removing the staging that the accident occurred. The employee, Burns, was instructed to go to work underneath the platform structure and remove nails from the braces as they were taken off.

The men had been ordered to take the staging down section by section, and instructed by the employer, Coulton, to be very careful about the manner in which it was taken down. The staging was removed by the workmen, under general orders from the said employer, but without proper supervision by him or any other person vested with authority to supervise its removal. The work had proceeded for about an hour and a half when the structure fell. Just prior to its fall an Italian workman who is not now working for Coulton, and who was not present to testify, had knocked the diagonal braces supporting the structure away from the bottom with a sledge hammer, this act not being performed by reason of any order from or with the knowledge of the said Coulton. The staging began to shake and a fellow workman remonstrated with him. It appears that the support at the extreme end of the platform was composed of two 4 by 8 timbers, joined by 2 by 6 ledger boards. The end timbers gave way and, in falling, struck against the next supporting timbers, 15 feet away, causing these in turn to strike others, until the whole structure toppled over, falling to the ground. Burns was underneath and when found, with a heavy timber on his stomach, had sustained a fracture of the spinal column which caused paralysis of the lower limbs and permanently incapacitated them for use. Another workman received injuries which maimed him for life and others were injured, more or less seriously.

It was shown by the evidence that the staging was ordered taken down section by section, which was the usual manner in

which to take a staging down, and that, under ordinary circumstances, the work would have been free from danger.

The evidence shows that, as a result of this injury, the employee suffered a complete paralysis of the body below the seat of fracture, with injury to spinal cord, which caused a complete loss of power and sensation below the region of the twelfth dorsal vertebræ. The injury caused the employee to be totally incapacitated for work from July 21, 1913, to Sept. 30, 1913, the medical evidence showing that had the employee by any possibility lived he would never have recovered the use of his lower limbs. Death occurred on Sept. 30, 1913, from fracture of the spine, with a complication of septicæmia, resulting from an extensive bed sore, the connection between the personal injury arising out of and in the course of the employment and the fatal termination thereof being conclusively established.

The following requests for rulings were made by John E. Reagan, Esq., attorney for the dependent widow: —

1. That upon all the evidence dependent's testator was injured by reason of the serious and willful misconduct of the employer.

2. That upon all the evidence the dependent, Bridget Burns, is entitled to recover double the compensation mentioned in section 6 of Part II. for a period of three hundred weeks, owing to the serious and willful misconduct of the employer.

3. If upon the evidence the Board finds that the employer gave orders to knock off the braces and take down the staging, and then, having knowledge of the weakened and unsafe condition of the staging, and while this work was going on as aforesaid, directed dependent's testator to work under the staging without notice to dependent's testator of its weakened or unsafe condition, he is guilty of serious and willful misconduct.

4. That the employer in ordering dependent's testator to do the work which he was doing at the time of his injury was serious and willful misconduct on the part of the employer.

5. That upon the evidence the employer had full knowledge of the weakened and dangerous condition of the staging, and setting dependent's testator at work under said staging with no knowledge on testator's part of said condition was something more than negligence, and was serious and willful misconduct.

6. That upon all the evidence the collapse of the staging was what the employer desired brought about, and the employer 'must have known of the weakened condition of said staging and that at some time it must collapse or fall from its own weight, on account of the braces being removed; and to send dependent's testator to work under the staging without calling this condition to the attention of the dependent's testator, and without his knowing it, is serious and willful misconduct on the part of the employer.

Requests Nos. 1, 2, 4, 5 and 6 are refused, and No. 3 is also refused, there being no finding that the employer had knowledge of the weakened and unsafe condition of the staging.

The insurer filed the following requests for rulings and findings: —

The insurer respectfully requests the Board to rule and find that there was no injury to the legs of Mr. Burns which caused any disability of the legs, the disability of the legs being in fact wholly due to the injury to the spine, which caused total disability of the whole body, and the compensation for which injury to the spine includes all compensation for disability resulting from that injury, including the disability of each and every member; and that it is established by the testimony that although the injury was a remote cause of Burns' death, the proximate cause of his death, which is the only cause that the law can consider as a cause, was septicæmia, due to a bed sore, which bed sore was the result of neglect on the part of those having the care of Burns to take the precautions reasonably necessary to keep his body, in places where it was subject to pressure as a result of his lying in bed, in a healthy condition.

These requests are refused.

There are three questions presented for decision by the Industrial Accident Board: —

First, it is claimed that the injury was caused by the serious and willful misconduct of the subscriber, and that double compensation is due the dependent widow. Upon all the evidence the Board finds that the injury was not caused by reason of the serious and willful misconduct of the subscriber, the evidence showing that the staging was taken down in the proper manner,

the fact that the subscriber had no intermediary, or assistant, to aid him in his direct supervision of the work not constituting serious and willful misconduct within the meaning of the term as used in section 3, Part II., of the act. Just before the collapse of the staging an Italian workman, who is not now working for Coulton, had knocked the diagonal braces supporting the structure away from the bottom with a sledge hammer, this act not being performed by reason of any order from or with the knowledge of the said Coulton. (Lewis v. Great Western Railway Company, 3 Q. B. D. 195; Parsons & Allen, at p. 37; John v. Albion Coal Company, 18 T. L. R. 27; Johnson v. Marshal, Sons & Co., Ltd., L. J. K. B. 868.)

Second, the insurer set up the claim that death did not result from the injury. The evidence shows, however, that a chain of causation, which was not broken by a *novus actus interveniens*, connected the injury with death, and we find, therefore, that death resulted from the injury, the septicæmia, which resulted from an extensive bed sore, being a contributory cause. (Dunham v. Clare, 71 L. J. K. B. 683; Ystraden Colliery Co. v. Griffiths, 78 L. J. K. B. 1044; Thoburn v. Bedlington Coal Co., Ltd., 5 B. W. C. 128.)

Third, it was claimed that the employee was entitled to the specific compensation provided for in section 11, (e), Part II., for the permanent incapacity of both legs for the full period of one hundred weeks from the date of the injury, the claim being advanced that the specific compensation did not terminate at death, but was due for the entire period. The Board rules that the specific compensation provided for in section 11, Part II., terminates with death. If the contention of the employee is correct, then it follows that if a workman having no dependents is injured in such a way as to lose his arm, and he subsequently dies, the compensation awarded him under section 9, Part II., will cease at death, there being no dependents, and the specific compensation awarded him under section 11, Part II., will continue. This construction cannot be regarded as carrying out the provisions of the Workmen's Compensation Act.

There is nothing in the language of the act which authorizes the continuance of these specific payments after death, nor is

there anything in the phraseology of the law, or the purpose which it aims to accomplish, to warrant this construction. Why, on principle, should compensation go to the estate of a dead man who is injured in such a way as to lose a member, and who subsequently dies, leaving no dependents, while the estate of an employee who is injured at the same time and under the same circumstances, no members being lost, and there being no dependents, receives nothing? It is conceivable that a man might be injured under such circumstances as to lose all his members, and live only a day or two, in which event his dependents or his estate would receive a considerably greater sum of money than the dependents of a fellow workman who may have been killed in the same accident, but under such circumstances as not to lose his members. This would produce inequality in the payment of compensation to the dependents of a deceased employee and defeat one of the principal objects of the statute, which aims to compensate every workman's family to the same extent, measured only by the earning capacity of the employee.

Again, there is nothing in the language of the act which provides that the specific compensation given under section 11, Part II., shall pass to the employee's estate in the case of death, or in what manner it is to be distributed. The statute does not set forth that it is a vested right, nor how it shall be applied in the event of the employee's death, — whether to his estate, subject to debts and ordinary distribution, or to his dependents, if he has any, or if he has no dependents, to his estate. The language of section 6, Part II., is explicit with regard to the payment of compensation to dependents, in case death results from the injury, providing that "the association shall pay the dependents of the employee . . . a weekly payment . . . for a period of three hundred weeks from the date of the injury." It seems fair to conclude that had the Legislature intended that the specific compensation provided for in section 11, Part II., should be considered a vested interest, passing to the estate of the workman upon his death, it would have so stated and made definite provisions by which to determine to whom this specific compensation should be paid.

The Board finds that the employee, the said John J. Burns,

received a personal injury arising out of and in the course of his employment, said injury terminating fatally, and that said personal injury was not caused by the serious and willful misconduct of the subscriber; that there is due the administratrix, Bridget Burns, specific compensation under section 11, Part II., in amount \$68.46, being ten and one-seventh weeks' compensation under said section, at \$6.75 per week, and eight and one-seventh weeks' compensation, under section 10, Part II., on account of total incapacity for work, at the rate of \$6.75 per week, that is, \$54.96; and that there is due the said administratrix for the benefit of the widow, Bridget Burns, who lived with her husband, the said John J. Burns, at the time of his death, the sum of \$6.75 weekly, that is, one-half his average weekly wages, for a period of three hundred weeks from the date of the injury, less eight and one-seventh weeks' compensation due the administratrix on account of total incapacity for work prior to the date of death.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

Decree of Supreme Judicial Court on Appeal.

SHELDON, J. 1. Under the provisions of St. 1911, c. 751, Part II., § 3, if the injury to the petitioner's husband was due to the serious and willful misconduct of his employer, the compensation must be doubled. She contends that this was the case. The Industrial Accident Board has found against her contention, and this finding is final, if there was any evidence to support it. Herrick's Case 217 Mass. 111 and cases there cited. The question is not whether it could have been found that the injury was due to the serious and willful misconduct of the employer, but whether we can say that the finding made was wholly unwarranted. Serious and willful misconduct is much more than mere negligence, or even than gross or culpable negligence. It involves conduct of a quasi criminal nature, — the intentional doing of something either with the knowledge that it is likely to result in serious injury or with

a wanton and reckless disregard of its probable consequences. (Banks *v.* Braman, 188 Mass. 367, and 192 Mass. 162 *note*; Warren *v.* Pazelt, 203 Mass. 328, 347; Yancey *v.* Boston Elevated Railway, 205 Mass. 162, 171; Willis *v.* Boston & Northern Street Railway, 208 Mass. 589; Sharkey *v.* Skelton, 83 Conn. 503, 507; Louisville, New Albany & Chicago Railroad *v.* Bryan, 107 Ind. 51, 53; Johnson *v.* Marshall Sons & Co. (1906), A. C. 409, 411; Lewis *v.* Great Western Railway, 3 Q. B. D. 195, 206, 213.) The finding of the Industrial Accident Board as to this must be sustained; and it must be held that the petitioner is not entitled to double compensation.

2. The insurer contends that no compensation should be allowed for the death of the employee. This is on the ground that the proximate cause of the death was not the injury, but was the septicæmia or blood poisoning which resulted from the bed sore that came in consequence of his confinement to bed. But this contention cannot be maintained. He had sustained a mortal injury, one from which death must sooner or later ensue, — a fracture of the spine, with a severance of the spinal cord, — which caused not only a complete paralysis of the lower limbs, but a loss of power and sensation below the seat of the injury. He was taken to a hospital, and afterwards was under proper medical care until his death. He was obliged to lie in bed in one position; and by reason of this an extensive bed sore was developed, and this extended and grew worse until it brought about the blood poisoning which was the immediate cause of his death. There was testimony from a physician that the death resulted from the injury. The finding of the Industrial Accident Board was that a chain of causation not broken by any new intervening act connected the injury with the death, and therefore that the death resulted from the injury, the septicæmia caused by the bed sore being a contributory cause.

It is manifest that there was evidence in support of the finding, and it must stand unless it was wrong as a matter of law. But that is not so. As was said in McDonald *v.* Snelling, 14 Allen, 290, 296, "the mere circumstance that there have intervened between the wrongful cause and the injurious consequence acts produced by the volition of animals or of human

beings does not necessarily make the result so remote that no action can be maintained. The test is to be found, not in the number of intervening events or agents, but in their character and in the natural and probable connection between the wrong done and the injurious consequence. So long as it affirmatively appears that the mischief is attributable to the negligence as a result which might reasonably have been foreseen as probable, the legal liability continues." Nor would it have been material if it had been found to be the fact that the bed sore was due to the mistake or the negligence of the physicians acting honestly. (*Gray v. Boston Elevated Railway*, 215 Mass. 143; *Sauter v. New York Central & Hudson River Railroad*, 6 Hun, 446.) In a case decided by the Court of Appeal, under the English Workmen's Compensation Act, it appeared that a workman who had met with an accident, though he had recovered from the immediate effects of his injury, had never regained his normal health, but continued to be weak and debilitated. Thirteen months after the accident he died from bronchitis, following an attack of influenza. It was by reason of the weakened condition to which the accident had reduced him that the bronchitis proved fatal. It was held that the death resulted from the injury. (*Thoburn v. Bedlington Coal Co.*, 5 *Butterworth's Workmen's Compensation Cases*, 128.) The same principle was upheld in *Dunham v. Clare* (1902), 2 K. B. 292, in which the death for which compensation was allowed was brought on by a supervening attack of erysipelas, but was found to have been the result of the preceding injury. (See also *Ystradowen Colliery Co. v. Griffiths* (1909), 2 K. B. 533; *Meyer v. Butterbrodt*, 146 Ill. 131.) Such cases as *Daniels v. New York, New Haven & Hartford Railroad*, 183 Mass. 393; *Snow v. New York, New Haven & Hartford Railroad*, 185 Mass. 321; *Fairfield v. Salem*, 213 Mass. 296; and *Scheffer v. Washington City, Virginia Midland & Great Southern Railroad*, 105 U. S. 249, are not applicable here, upon the findings of the Industrial Accident Board.

It follows that compensation rightly was allowed for the death.

3. Compensation also has been allowed under St. 1911, c. 751, Part II., § 11 (amended by St. 1913, c. 696), for the

permanent incapacity of both legs. The insurer contends that this was erroneous, because there was no actual injury to the feet or legs themselves, but only to the spine and spinal cord, the paralysis of the lower limbs being due to that injury alone. This presents a very interesting and somewhat close question, which we do not find to have been passed upon by any court. But it is enacted by R. L., c. 8, § 4, cl. 3, that "words and phrases shall be construed according to the common and approved usage of the language," with a provision for technical words and legal terms which is not now material. In common speech the word "injury," as applied to a personal injury to a human being, includes whatever lesion or change in any part of the system which produces harm or pain or lessened facility of the natural use of any bodily activity or capability. If one by external violence had his optic nerve severed close to the brain, or its function destroyed so as to result in blindness, although nothing whatever had been done to the eyes themselves or to the structures immediately surrounding them, it yet would be said in common speech that his eyes had been injured to the point of uselessness. Whatever part of the human body thus has been made incapable of its normal use, so that practically it has ceased to be available for the purpose for which it was adapted, is certainly injured, according to the common understanding of men. It would be difficult to say that one whose legs had been paralyzed like those of this employee, if entitled to maintain an action therefor, could not properly describe the injury as having been done to his legs. It seems to us to come within the meaning of the statute. It is a harm done to the legs, a loss or detriment caused to them, — something which impairs their soundness and diminishes their value. (See 16 Am. and Eng. Encyc. Law, 2d Ed., 499; 4 Words and Phrases, 3615.)

It has been suggested that an injury to a higher part of the spinal cord or to the brain itself might result in a total paralysis of all the bodily organs and so lead to a quadrupling of the additional compensation. But we doubt if that would be so. The injuries specified in clause (a) of St. 1913, c. 696, § 1, once compensated for, it is by no means certain that anything more could be allowed. It at least could be plausibly contended

that everything else would have been included; that the provisions of clauses (b), (c) and (d) covered nothing additional, but merely provided for injuries of less severity; and that clause (e) simply included a total incapacity resulting from either one of the causes specified.

4. We are of opinion, however, that the right to an order for the future payment of this special compensation ceases with the death of the person injured. It is a right peculiar to himself, not created for the benefit of his dependents. It is a part of the scheme for special compensation provided by sections 9, 10 and 11 of Part II. of the act. By section 9 provision was made for special compensation for a period of total incapacity for work; by section 10, compensation was fixed for a period of partial incapacity; by section 11, as amended by the act of 1913, additional compensation is given for the total or partial loss or incapacity of certain members of the body. All of these provisions seem to have been made for the personal relief of the injured employee, his dependents being provided for by the compensation to be made for his death. The special compensation takes the place of the wages which but for the injury the employee might have earned. As was pointed out by the Industrial Accident Board in its decision, there is nothing in the language of the act which authorizes the ordering of these special payments for a time after the death of the employee, nor is such a construction required by its phraseology or its apparent purpose. If this were not so, the amounts to be paid to his dependents would be increased proportionately to the quickness with which his death followed the incurring of his incapacity, although these payments were manifestly intended to make up for the loss of his own earning capacity. In our opinion the ruling that this specific compensation should be allowed only during the lifetime of the injured employee was correct.

The question whether, if during his lifetime and upon his own petition, this specific compensation had been ordered for a stated number of weeks, and his death had occurred before the expiration of that period, the right thus adjudicated would cease at his death, or whether the payments must be continued until the end of the appointed time for the benefit of his de-

pendents, is not raised here, and of course has not been passed upon.

The result is that the decree of the Superior Court was correct, and must be affirmed.

So ordered.

CASE No. 434.

THOMAS SEPTIMO, *Employee.*

BOSTON RUBBER SHOE COMPANY, *Employer.*

MASSACHUSETTS EMPLOYEES INSURANCE ASSOCIATION, *Insurer.*

SERIOUSLY AND PERMANENTLY DISABLED EMPLOYEE ENTITLED TO COMPENSATION ON THE BASIS OF TOTAL INCAPACITY FOR WORK DURING A CERTAIN SHUT-DOWN PERIOD.

The employee, who was seriously and permanently disabled by reason of the loss of three fingers of each hand, was given employment as an elevator operator on a weekly rate of \$9. He had previously earned an average weekly wage of \$10. The factory shut down for a period of three and five-seventh weeks, during which time the employee received a weekly compensation of 50 cents. The evidence showed that it was a matter of extreme chance if he would not be wholly disabled from earning any wages if he should in the future be furnished no employment by his former employer.

Held, that the employee was entitled to partial compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board, revising the decision of the committee of arbitration, finds that the employee was entitled to compensation on the basis of no earning capacity.

Appealed to Supreme Judicial Court.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Thomas Septimo v. Massachusetts Employees Insurance Association, this being case No. 434 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of David T. Dickinson, chairman, George R. Pulsifer for the employee, and Albert T. Gould for the insurer, being duly sworn, heard the parties and their witnesses at the Hearing Room of the Industrial

Accident Board, Tuesday, Nov. 18, 1913, at 10 A.M., and reports as follows: —

The only question raised before the committee in this case was whether or not this employee, who had obtained a position with his former employer as an elevator operator, after the injury, at \$9 per week, should have his compensation on account of his injuries increased during a temporary closing down of the mill for about one month, viz., from July 24, 1913, to Aug. 21, 1913, three and five-sevenths weeks. The closing down of this mill was an annual occurrence, usually about two weeks, but it was for three and five-sevenths weeks at this time, owing to a slackening up of business.

His average weekly wages when he received the injury were \$10. His average weekly wages in the new position of elevator operator after the injury were \$9, and his compensation for partial incapacity was paid him before and during said period of lay-off, and has been since, in accordance with the statute, at the rate of 50 cents per week.

The employee during this period of closing down had earned no wages, and it did not appear that he had made an effort to earn anything during the time, although it appears probable that, considering his injured condition, he would not have been able to have obtained work or earned anything elsewhere.

The committee finds that inasmuch as his average weekly wages in his new position of elevator operator were \$9, and inasmuch as he had kept this new employment status during the period of shut-down, he is entitled to a compensation for partial incapacity of 50 cents per week during said three and five-sevenths weeks. He is still employed in his position as elevator man.

The legal effect of this employee's losing or retiring from his new position without fault of his own was not before the committee. His present compensation rights are therefore adjusted upon the basis that an *average* weekly wage of \$9 is being earned by him since the injury, and that half the difference between this and his former average weekly wage, viz., 50 cents per week, is the proper compensation for his partial incapacity, both during his regular working time and occasional lay-offs.

This decision and all findings regarding compensation or the existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III., of the Workmen's Compensation Act, and the general provisions of said act and its amendments.

DAVID T. DICKINSON.
GEO. ROYAL PULSIFER.
ALBERT T. GOULD.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, Pemberton Building, Boston, Mass., on Thursday, Jan. 1, 1914, at 10.45 A.M., and, revising the decision of the committee of arbitration, finds as follows: —

The award of 50 cents per week as partial compensation during the period of shut-down, amounting to three and five-sevenths weeks, was incorrect, being made by the committee on the assumption that the employee's average weekly wages *after* the injury were \$9 per week, and that he would *average* this sum of \$9 per week in some way, even for the three and five-sevenths weeks when he received no wages at all on account of the shut-down. This assumption was incorrect because it appears that his average weekly wages after the injury are less than \$9 a week, as above stated, and no definite time within which to average his wages, after the injury, was adopted by the committee.

This employee was seriously and permanently disabled physically by his injury, as is indicated by the photograph annexed, which is made a part of this report. It will be a matter of extreme chance if he will not be wholly disabled from earning any wages, as a result thereof, if he should in the future be furnished no employment by his former employer.

The average weekly wages *after* the injury, referred to in the Compensation Act, Part II., section 10, seems to contemplate an *average* for a yearly or considerable period after the injury.

The only practical way of determining this average *after* the injury, so that proper current payment of compensation can be made weekly, is to pay the employee one-half the difference between the amount the employee earns in each week after the injury and his former average weekly wage before the injury.

The Board finds that he was not able to earn anything by reason of his injury during each of the three and five-sevenths weeks when his wages were stopped owing to the shut-down, and that he was therefore entitled to his compensation, during such three and five-sevenths weeks, of one-half the difference between nothing and his former average weekly wages of \$10 before the injury, that is, \$5 per week. He should have been paid during the three and five-sevenths weeks of shut-down \$5 per week as compensation instead of 50 cents per week. He should also be paid by the insurer a compensation of \$5 per week during any other weeks in which his employer furnishes him no employment, and when he is unable to earn anything elsewhere by reason of his injury.

The compensation for past periods and in the future should be adjusted accordingly.

This decision and all findings regarding compensation or the existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III., of the Workmen's Compensation Act, and the general provisions of said act and its amendments.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 435.

CALVIN G. JONES, *Employee.*

DI PIETRO BROTHERS & MARINI, *Employer.*

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *Insurer.*

INSURER QUESTIONS JURISDICTION OF COMMITTEE ON THE GROUND THAT EMPLOYEE SIGNED A SETTLEMENT RECEIPT. JURISDICTION TAKEN AND COMPENSATION AWARDED THE EMPLOYEE FOR A CERTAIN PERIOD, AFTER WHICH ALL INCAPACITY WILL BE DUE TO NATURAL EFFECTS OF PRE-EXISTING DISEASE.

The employee received a personal injury while lifting and carrying merchandise about the premises of his employer, by reason of which he was incapacitated for work. The impartial physician reported that but for the injury caused by his fall he would have been able to have continued and performed such work as he was doing for his employers for a period of from two to three years thereafter, but that in his opinion the incapacity for work as a result of the fall and injury resulting therefrom would terminate at some time between two to three years after said injury. Thereafter the natural effects of his pre-existing condition of syphilis would incapacitate him for work. The insurer questioned the jurisdiction of the committee, on the ground that the employee had signed a settlement receipt.

Held, that the employee was entitled to compensation; that the committee had jurisdiction.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board finds that the employee is entitled to compensation for incapacity for work as a result of the injury for a period of one hundred and thirty weeks, after which all incapacity will be due to pre-existing disease.

Appealed to Supreme Judicial Court.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Calvin G. Jones v. Fidelity and Deposit Company of Maryland, this being case No. 435 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of David T. Dickinson of the Industrial Accident Board, chairman, Benjamin A. Lockhart for insurer, and A. Dudley Bagley for employee, heard the parties and their witnesses in the Hearing Room of the Industrial Accident Board, Pemberton Building, Boston, Mass., on Saturday, Nov. 15, 1913, at 10 A.M.

In this case the insurer objected to the jurisdiction of the committee or the Industrial Accident Board on the ground that the employee had agreed with the insurer to accept certain compensation in settlement of his claims. A copy of the agreement is annexed to this finding. The insurer then introduced evidence and took part in the hearing, with the agreement between the parties that if it should be later determined that the so-called settlement receipt barred the claimant from recovering further compensation, the introduction of evidence and participation in the hearing by the insurer should be without prejudice to a finding in his favor. If the receipt were no bar to the claimant on account of the conditions stated therein, or by reason of the provisions of the Workmen's Compensation Act, so called, and its amendments, the case should be dealt with as one over which the committee and the Industrial Accident Board had jurisdiction, to hear the evidence and to decide thereon in accordance with regular procedure.

The committee ruled that it had jurisdiction, both by reason of the condition stated in the receipt, that the settlement receipt was subject to review, and by reason of the general provisions of the Workmen's Compensation Act, so called.

The committee finds that on and before Oct. 30, 1912, the claimant, a man twenty-seven years of age, was in the employ of said employer as a helper and driver. Lifting and carrying of merchandise about the premises of the employer were a part of his duties. On said Oct. 30, 1912, the employee, according to the testimony of Felicano Di Pietro, was found by said Di Pietro lying on the ground floor of the basement of the employer's store at about 8 o'clock in the morning. At that time he was in an unconscious condition.

The employee testified he remembered that shortly before 8 o'clock on that morning he was walking on the floor of the premises directly over the basement towards a stairway which led down from such floor to said basement, and that there was a trap door directly between him and the entrance to said stairway; that he then intended to go to the basement to get some bottles of ale to carry back upstairs, in the course of his duties; that at the time he was walking in this direction and for said purpose he was close to and approaching said trap door and

stairway. He also remembered that a light was shining from the direction towards which he was walking. This was the last he remembered until he regained consciousness after being found lying on the basement floor as above mentioned. The place where he was found was directly under the trap door, with his head close to the underpinning wall of the basement, and with his body and feet extending out at right angles from said wall. This place under the trap door was a recess or alcove opening off of the main cellar, and the distance was about 4 feet from the edge of the cellar floor, where the recess commenced, to the wall near which the employee's head was lying. The flooring of the recess was of concrete similar to the main cellar floor, and the distance to the trap door above was about 7 feet.

His employer, Felicano Di Pietro, testified that he carried the claimant, after finding him unconscious on the basement floor as above stated, about 15 feet to a stairway, and then called for assistance. He testified further that when he found the claimant the trap door overhead was closed, and that he knew of no work that morning before this time which would have required the trap door to have been used or opened. The claimant soon after this was taken in a wagon to the East Boston Relief Hospital. While being taken to the hospital he recovered consciousness and stated to a fellow worker who accompanied him that he had fallen through the hole into the cellar. The employer testified that the trap door was never in use before 8 o'clock in the morning so as to require it to be opened. A fellow worker testified that the trap door was frequently open before 8 o'clock in the morning, so that merchandise could be lowered into the cellar which had remained on the upper floor during the preceding night.

A fracture was found at the base of the claimant's skull, on examination at the hospital, and after arriving there he went through several convulsions. No other injury or marks or bruises were found on the claimant except bleeding from the left ear. A fellow worker testified that shortly before the claimant was found in the basement as above stated he had complained of feeling ill. The employer, Di Pietro, testified that when he found the claimant his legs and arms were stiff

and rigid, and that he noticed no froth around his mouth or lips.

The insurer contended that the claimant had fallen from an epileptic fit while walking on the basement floor beside the recess wherein he was found; that it was shown in evidence that once in 1909 the claimant had fallen from some attack of temporary unconsciousness. The claimant testified that his experience at this time in 1909 was due to an attack of acute indigestion. A physician called by the insurer testified that just before persons are seized by epileptic fits they often seem to see a light, like a subdued light shining in a dark room, and that they would remember such an impression; that this phenomenon in a case of epilepsy was called the aura. This physician also testified that convulsions such as the claimant had experienced were an accompaniment of epileptic fits. He also testified that such convulsions often accompanied a concussion of the brain caused by fractures of the skull such as the claimant appeared to have sustained; that such convulsions were as consistent with such concussion as they were with epilepsy. The condition of the claimant at the hospital was not diagnosed or found, in the opinion of the attendant physician, to be that of epilepsy, and neither his family, his fellow workers, nor other persons had known of his being subject to epileptic fits, or had ever seen him in such a condition, unless his condition at the time of this injury and the unconsciousness in 1909, above stated, were such attacks.

Examination by impartial physicians, appointed by the Board, showed that this employee had been suffering from syphilitic infection for a number of years before falling and receiving this fracture. At the time of receiving this injury the syphilis had impaired his sight so that there was a progressive failure of vision, particularly in his right eye. The claimant had had trouble with his eyes for nine or ten years, but had not noticed any abnormal feelings in his head before this injury. Since the injury he has experienced dizziness and pressure in his head, hearing humming noises, marked depression of spirits and loss of strength and energy. He tried to work for a few days shortly before the hearing, but had to give up on account of dizziness. It appears that the syphilitic

changes in his eyes would probably have led in a comparatively short time to total blindness even if the injury had not occurred, and that his disease was tending towards a fatal conclusion. The committee finds, however, that a fracture of the skull such as was sustained by this employee is more serious and likely to be followed by a longer train of symptoms and disorders than would be the case with a person who had no syphilitic trouble; that the employee has been wholly incapacitated for work since receiving the fracture, and still continues to be so incapacitated, and that he would not have been so incapacitated but for said fracture and the accompanying concussion of the brain; and that said injury has aggravated and accelerated the coming of the progressive loss of vision, dizziness and other disorders and weakness from which he is now suffering, and which would have come in time even without the injury.

The committee finds from the weight of all the evidence that the claimant fell through the trap door as a result of dizziness, together with his poor vision, which seized him while he was engaged in his work as he was walking towards the trap door with the intention of going down the stairway to the basement; that the trap door was then open; that the claimant did not have an epileptic fit. The position of his body in the alcove or recess directly under the trap door was inconsistent with the theory that the claimant fell while walking on the basement floor by reason of an attack of dizziness, which the committee finds he suffered. The trap door might easily have been closed from above, after the claimant had fallen through it, by parties who had not noticed him lying on the floor 7 feet below. This is consistent with his later discovery, lying in the recess with the trap door closed above him. His average weekly wages at the time of the injury were \$13 a week.

The committee finds that he is entitled to compensation for total incapacity at the rate of \$6.50 per week from Nov. 13, 1912, the fifteenth day after the injury, to the present time, and to continue during such total disability.

This decision and all findings regarding compensation or the existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the

facts warrant such action, in accordance with section 12, Part III., of the Workmen's Compensation Act, and the general provisions of said act and amendments.

DAVID T. DICKINSON.

A. DUDLEY BAGLEY.

BENJAMIN A. LOCKHART.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties in the Hearing Room of the Board, New Albion Building, Boston, Mass., on Thursday, Feb. 19, 1914, at 2.45 P.M.

In addition to the evidence introduced at the hearing before the committee of arbitration, Dr. Abner Post, an impartial physician appointed by the Board, reported as follows: that in his opinion the employee, but for the injury caused by his fall on Oct. 30, 1912, would have been able to have continued and performed such work as he was doing for his employers for a period of from two to three years thereafter, but that in his opinion the incapacity for work as a result of the fall and injury resulting therefrom would terminate at some time between two to three years after said injury, and that thereafter the natural effects of his pre-existing condition of syphilis would incapacitate him for work. On May 1, 1914, the employee obtained light work with the Phonoharp Company of East Boston, suitable to his diminished capacity for labor, at wages of \$9 per week.

The Board therefore finds that on all the evidence this employee is entitled to compensation for incapacity for work as a result of the injury for a period of two and one-half years, or one hundred and thirty weeks from Nov. 13, 1912, the fifteenth day after the injury, and that thereafter all incapacity resulting from the injury ceases; that compensation for total incapacity is due from Nov. 13, 1912, to May 1, 1914, seventy-six and two-sevenths weeks, at the rate of \$6.50 per week, amounting to \$495.85; and for partial incapacity from said

May 1, 1914, at the rate of \$2 per week, during the remainder of said period of one hundred and thirty weeks.

This decision and all findings regarding compensation or the existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III., of the Workmen's Compensation Act, and the general provisions of said act and its amendments.

DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
JOSEPH A. PARKS.

COPY.

INDUSTRIAL ACCIDENT CASES.

FORM No. 8.

WORKMEN'S COMPENSATION ACT,
INDUSTRIAL ACCIDENT BOARD,
BOSTON, MASS.

Every agreement in regard to compensation under this act is subject to approval by the Industrial Accident Board, and a memorandum of the same must be filed with the Board, whether said agreement is written or oral, and whether it is made by one or both parties, or in the form of a receipt. Any weekly payment or settlement under the act, whether purporting to be final or otherwise, may be reviewed by the Board. (Section 20, Part II., and sections 4 and 12, Part III., chapter 751 of the Acts of 1911, and amendments thereto, and Rule No. 6 adopted by the Board.)

CALVIN JONES, *Employee.*

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *Insurer.*

AGREEMENT IN REGARD TO COMPENSATION.

We, Calvin Jones, residing at city or town of East Boston, and the Fidelity and Deposit Company of Maryland, have reached an agreement in regard to compensation for the injury sustained by said employee, who while in the employ of Di Pietro Bros. & Marini, on October 30 fell through a trap door into cellar and fractured skull and hurt back.

The terms of the agreement follow:—

Compensation during disability at one-half of his weekly wages, which is \$13 per week, making \$6.50. Medical services first two weeks.

MARY E. STUART,
10 Tremont Street, Boston.

CALVIN JONES,
FIDELITY AND DEPOSIT COMPANY
OF MARYLAND.
By H. E. WARREN.

Approved Dec. 11, 1912, subject to the provisions of the Workmen's Compensation Act.

INDUSTRIAL ACCIDENT BOARD,
ROBERT E. GRANDFIELD,
Secretary.

CASE No. 436.

JOHN P. HOLLAND, *Employee*.

WILLIAM COULTON, *Employer*.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *Insurer*.

EMPLOYEE WHO RECEIVED A PERSONAL INJURY WHILE ASSISTING IN TAKING STAGING DOWN UNDER THE DIRECT PERSONAL SUPERVISION OF EMPLOYER, WHO EMPLOYED NO INTERMEDIARY OR ASSISTANT TO AID HIM IN HIS SUPERVISION OF THE MEN AND THEIR WORK, NOT ENTITLED TO DOUBLE COMPENSATION. INJURY NOT CAUSED BY REASON OF SERIOUS AND WILLFUL MISCONDUCT OF EMPLOYER.

The employee, with other men, had been ordered to take a staging down section by section, and had been instructed by the employer to be very careful about the manner in which it was taken down. The staging was removed by the workmen, under general orders from the employer, but without proper supervision by him or any other person vested with authority to supervise its removal. The work had proceeded for about an hour and a half when the structure fell.

Held, that the employee was not entitled to double compensation, the injury not having been caused by reason of the serious and willful misconduct of his employer.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to Supreme Judicial Court.

(*Note*. — Appeal withdrawn in view of decision of Court in the Burns case. See page 273.)

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of John P. Holland v. Fidelity and Deposit Company of Maryland, this being case No. 436 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Edward F. McSweeney of Boston, Mass., chairman, representing the Industrial Accident Board, George P. Beckford, Esq., 53 State Street, Boston, Mass., representing the employee, and Addison Goldsmith, Esq., 14 Park Road, Winchester, Mass., representing the

insurer, heard the parties and their witnesses in the Selectmen's Room, Town Hall, Wellesley, Mass., on Saturday, Oct. 4, 1913, at 10 A.M.

This being a case in which serious and willful misconduct on the part of the employer, as provided in section 3 of Part II. of the Workmen's Compensation Act is involved, the employer, William Coulton, agreed in writing to the nomination by the insurance company of Mr. Addison Goldsmith as the arbitrator representing the insurer in this case.

The appearances were as follows: John A. McCaig, Esq., for the employer, John E. Reagan, Esq., for the employee, Albin L. Richards, Esq., for the insurer.

From the evidence it appears that John P. Holland was employed as a laborer by William Coulton, who had the contract to build an ice house at Wellesley for the Boston Ice Company, and was insured by the Fidelity and Deposit Company of Maryland.

It appears that this ice house was a structure 288 feet long and 182 feet wide, divided into ten sections or bays, each section being numbered and separated from the other. A staging about 30 feet high, with a top platform on which the men worked, 25 feet from the ground, and another 15 feet from the ground, was being taken down. Coulton had about 50 men employed on this job, and looked after all the details of superintendence himself, having no foreman directly responsible as such for the supervision of the work.

It appeared from the testimony of Terence William Maguire — who was hired for a blacksmith, but, there being no blacksmithing to be done there, was working as a carpenter's helper — that work to remove this staging structure had begun on the Saturday preceding the date of the accident, and on coming to work Monday morning practically all the men working in ice house No. 1 continued the work of taking down the platform. Maguire testified that he was working on the top of the platform and saw an Italian, whose name he does not know, and who is not now working for Coulton, come along with a sledge hammer and knock away from the bottom the diagonal braces supporting the structure. When Maguire began to feel the staging shake he called to this Italian and remon-

strated with him, saying he wanted to cross, asking him if he thought he was a bird, to cross without any supports. He testified that five minutes before the accident he saw Coulton in the room. Coulton has a very loud voice and he heard him ordering the men to take the staging down section by section, and to be "damn careful about it."

Q. You say you heard Coulton instructing the men to take down one section at a time? Was that order followed by the men? A. We were starting to follow it.

There was practically no disagreement in the testimony of any of the workmen, whether called to testify by the employer, Coulton, the insurance company, or the counsel for the injured man. All the testimony was to the effect that the staging had been properly erected, and that Coulton had ordered it taken down section by section, and this was the proper way to do this work.

Daniel McDonald testified: —

The side cross boards had been removed at the time.

Q. So this staging stood in the middle of house, unsupported other than by these ledger boards around the side of it? A. Yes.

Q. How long did it take to remove those supports to the uprights? A. Took about — an hour and a half I guess we worked at it.

Q. Mr. Coulton set you to work doing that particular kind of work? What did Mr. Coulton set you to work to do? A. Did not set me to work doing anything particular any more than the rest.

Q. What was that? A. Taking off the braces.

Q. I take it you had been working at that something over an hour at the time the accident happened? A. Something over an hour.

Archie McDonald testified: "The braces were used to hold up the staging, make it solid." He did not know how long they had been taking down those braces. He was there an hour and a half before it happened. "They were taking down braces and plank all the time. Some braces."

All the witnesses were in agreement that a ledger board on each side, which was the horizontal brace connecting the various sections of the platform, was in place. One witness, Daniel McDonald, called by the counsel for the injured employee, testified that he was working on this staging up to three

minutes before it fell; he felt no tremors or shaking; he got down, not because he was afraid of the stability of the structure, but because he wanted to get a drink. When he came down witness said he could not remember whether or not any braces remained up; "if there were I probably would have remembered them." He testified that in his opinion, as a carpenter, the manner the staging was erected and the way it was being taken down by the employer, Coulton, was the proper method to pursue in these cases; he could not find fault or suggest any improvement in the construction or the method of taking down this structure. He also remembered that Coulton had come into house No. 1 a short time before the accident, and gave some orders referring to the method of taking the staging down; but other than to have the impression that Mr. Coulton's orders were concerned with taking down the staging, he could not testify exactly what Coulton had said. Coulton was right underneath witness, who was on the staging knocking off braces.

Other witnesses, workmen employed by Coulton, corroborated the testimony of Coulton's giving the order, and as to the condition of the structure.

Holland, with at least one other man, when they arrived at work in the morning, was told to go under the platform structure and knock nails out of the braces as they were taken off the staging.

There was no testimony as to exactly how the accident occurred. It appears that the support at the extreme end of the platform was composed of two 4 by 8 timbers, joined by ledger boards, 2 by 6. These timbers on the ends gave way and falling struck against the next supporting similar timbers, 15 feet distant, and these in turn struck others, and the whole thing toppled over, as described, like a "house of cards." When the structure fell, Holland was underneath.

As the result of his injuries, Holland had his left limb amputated about halfway from the knee to the ankle. Holland appeared at the hearing on crutches.

Dr. Michael Francis Burke testified substantially as follows in regard to Mr. Holland's injuries: —

I have treated Mr. Holland; his chief injury was an injury to the lower extremity about the ankle. He had a compound fracture and dislocation of the left leg just above the ankle, and he was taken to the hospital, where I saw him with the bone protruding through the flesh and his foot bent at a right angle to the axis of the leg. I put him on the operating table, etherized him and reduced the deformity and put on a plaster cast to hold the limb in position. We opened the plaster cast the following day, on account of a great amount of hemorrhage, bleeding, oozing, I might say, from the wound. We watched the condition of the limb from day to day, and it was evident, after a few days, that gangrene was developing in the limb below the seat of fracture; that is, the limb was cold and gradually became darker, until beginning signs of mortification set in. The patient was seen in consultation with other doctors, one of whom was the doctor for the insurance company, and it was evident that nothing but amputation could save the man's life, so that his limb was amputated about halfway from the knee to the ankle, above the diseased tissues. He remained in the hospital some eight or ten weeks, I couldn't say exactly, and made a favorable recovery.

Q. Would you say that Holland was totally incapacitated for work at the present time as the result of the injury? A. I should say he was totally incapacitated for certain kinds of work, — manual labor.

Q. Do you say that Holland was totally incapacitated for work resulting from the injury he received in this case, so far as it appertains to the kind of work he was doing at the date of the accident, and so far as the work he was doing at the time of the accident is that of a laborer? A. I should say that he was totally incapacitated for performing the sort of work he did at the time of the accident.

Q. Would you say at the present time he was totally incapacitated for work resulting from this injury? As that of a laborer, I am talking about — present time? A. I should say he was totally incapacitated.

Q. And that total incapacity as a laborer for work resulting from this injury has continued from the date of the injury down to the present time? A. I should say it had. As to how long this incapacity for work as a laborer will continue would depend largely on how soon he could use an artificial limb, and the kind of work he might get after getting an artificial limb.

The only issue in this case is: Was the injury to Holland due to the serious and willful misconduct of his employer, Coulton? It appeared from the evidence of two of the witnesses that these witnesses, with others amounting to 8 or 9 to a gang, had been, since going to work that morning at 7 o'clock, engaged in knocking off braces, and that at the time of the accident all the braces which ran from one section to another had been knocked off, and that the only thing that sustained

the staging was a ledger board. It further appeared that from 7 o'clock to within about five minutes of the accident the employer had been in or about the room where the accident occurred; that he had stood beneath the staging upon which one of the witnesses, who testified, says he was standing knocking off braces; and that the employer himself set the injured man, Holland, to work knocking nails out of braces, and that more were engaged in knocking nails out of braces when the accident occurred. None of these facts were denied by the employer, although he testified.

The arbitrators find that the staging was apparently well built, and that shortly before the accident occurred Coulton had given directions, which were heard by some of the employees, that the staging should be removed carefully, section by section, which is agreed to be the proper way to do it. It appears that Coulton had set the gang of 15 or 16 men at work at 7 o'clock on the morning of the day of the accident, taking down this staging. Some of the men were set to work knocking off braces from the time of going to work to within two or three minutes of the time of the accident, and at the time of the accident an unknown number of diagonal braces which ran from one section to the next along the sides of the staging had been removed so that the staging was supported substantially by a ledger board on each side. Coulton had been in and about room or bay No. 1 much of the time from 7 o'clock to within five minutes of the happening of the accident, and at one time he stood in the room directly beneath where one of the witnesses was standing upon the staging knocking off braces. About fifteen or twenty minutes before the staging fell Coulton had called Holland from work outside the ice house, directing him to get a hammer and take the nails out of the lumber which the employees were knocking down, and at the time of the accident Holland was on the ground beneath the staging taking nails out of the braces. Coulton personally attempted to superintend and direct this work without any foreman, vested in his absence from the job, or any section of it, with the responsibility of superintendence. This accident is due to Coulton's failure closely to supervise the removal of the structure at all times.

Coulton testified that a general removing of the diagonal braces would be a dangerous manner of taking down the staging, because if this was done the structure would be in danger of collapse. It was clearly Coulton's responsibility to see that nothing was done to endanger the life and limb of his workmen; but the picture left in the minds of the arbitrators after hearing the evidence in this case is that of a contractor taking a large job, employing no assistants vested with power to enforce his commands, hastening personally from one part of the job to another, giving proper orders, and then depending upon the intelligence of his workmen, part of whom understood little or no English, to carry out these orders carefully, and with due regard to the safety of their fellow employees.

The evidence shows that the staging was built carefully; it is obvious that this was the profitable thing for Coulton to do; but when the work for which the staging was built was completed, the quicker the staging was removed the better, from the viewpoint of the contractor's profit, and so workmen were allowed to remove braces, under general orders, but without supervision, until the structure was so weakened in every part that it gave way, killed one workman, maimed another for life, and injured others more or less seriously.

Considering the dangerous result of this attempt to save money, this is undoubtedly serious misconduct, but there is no evidence that any workman engaged on the job protested that the weakened condition of the structure was dangerous; in the absence of any evidence on this point, while Coulton should have known it was dangerous, the element of willfulness does not appear, and the serious and willful misconduct contemplated by the act, and as defined by the various decisions under the English law, is not shown in this case, and the arbitrators so find.

The arbitrators find that Holland is entitled to the additional payments provided in paragraph (b) of section 11 of Part II. of the act, for fifty weeks, for the loss of a foot above the ankle, based on one-half his average weekly wages of \$13.50, or \$6.75 per week, a total of \$337.50; to reasonable medical and hospital services for two weeks from the date of the injury;

and to total disability, based on one-half of his average weekly wages of \$13.50 per week, or \$6.75 per week, from the first two weeks after the date of injury for an indeterminate period.

EDW. F. MCSWEENEY.

ADDISON M. GOLDSMITH.

Dissenting Opinion.

I agree with the findings of fact in the report in so far as they go, but feel that in addition to what has been found we should also find, and I do here find, that in view of the fact Coulton set men to work knocking off braces, was in the room while they were knocking off braces, and set injured at work knocking nails out of braces, that he knew that the braces were being knocked off the whole staging. I disagree with the finding of law which says that this was *not* willful misconduct, and find that as the employer knew the men were knocking the braces off and knew this was a dangerous manner of taking down the staging because of the danger of collapse,—that allowing this to be done, and knowing it was being done, was willful misconduct.

GEORGE P. BECKFORD.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room of the Industrial Accident Board, Pemberton Building, Boston, Mass., on Thursday, Nov. 20, 1913, at 10 A.M.

John A. McCaig, Esq., appeared for the employer, William Coulton, Albin L. Richards, Esq., for the insurer, and John E. Reagan, Esq., for the employee, John P. Holland.

The Board finds, upon the evidence introduced before the committee of arbitration, that the employee, John P. Holland, received a personal injury arising out of and in the course of his employment, by reason of the collapse of the staging structure which had been used in erecting an ice house for the Boston Ice Company at Wellesley, Mass. The ice house was 288 feet

long and 182 feet wide, the staging being 30 feet from the ground at its highest part, with a top platform 25 feet from the ground and another platform 15 feet from the ground. Fifty men were employed on the job, and William Coulton, the employer, had entire charge of the work, having no intermediary, or assistant, to aid him in his supervision of the men and their work. The ice house had been erected, and it was while the men were engaged in removing the staging that the accident occurred. The employee, Holland, was instructed to go to work underneath the platform structure and remove nails from the braces as they were taken off.

The men had been ordered to take the staging down section by section, and instructed by the employer, Coulton, to be very careful about the manner in which it was taken down. The staging was removed by the workmen, under general orders from the said employer, but without proper supervision by him or any other person vested with authority to supervise its removal. The work had proceeded for about an hour and a half when the structure fell. Just prior to its fall an Italian workman who is not now working for Coulton, and who was not present to testify, had knocked the diagonal braces supporting the structure away from the bottom with a sledge hammer, this act not being performed by reason of any order from or with the knowledge of the said Coulton. The staging began to shake and a fellow workman remonstrated with him. It appears that the support at the extreme end of the platform was composed of two 4 by 8 timbers, joined by 2 by 6 ledger boards. The end timbers gave way and, in falling, struck against the next supporting timbers, 15 feet away, causing these in turn to strike others, until the whole structure toppled over, falling to the ground. Holland was underneath when the collapse came, receiving a compound fracture and dislocation of the left leg just above the ankle, and other injuries. He was given proper medical and surgical attention, but gangrene developed in the limb below the seat of fracture, and amputation became necessary in order to save his life. The leg was amputated about halfway between the knee and the ankle above the diseased tissues. The evidence shows that the employee was totally incapacitated for work as a result of the injury at the

time of the hearing, and that the incapacity for work would continue for an indefinite period, depending upon his ability to use an artificial limb and to secure work which he could perform after he had adapted himself to the use of an artificial limb.

The employee claims that the injury was caused by the serious and willful misconduct of the subscriber, and that double compensation is due him under section 3, Part II., of the act. The evidence shows that the staging was ordered taken down section by section, this being the usual manner in which to take the staging down, and that under ordinary circumstances the work would have been free from danger. The orders for the taking down of the said staging had been given by the employer, Coulton, who instructed his workmen to be very careful about the manner in which it was taken down, but failed to provide an intermediary, or assistant, to aid him in his supervision of the men and their work. Just before the collapse of the staging an Italian workman had knocked the diagonal supporting braces away with a sledge hammer, this act not having been performed by reason of any order from or with the knowledge of the said Coulton. Upon all the evidence the Board rules that the injury was not caused by reason of the serious and willful misconduct of the subscriber, and the claim for double compensation is disallowed. (*Lewis v. Great Western Railway Company*, 3 Q. B. D. 195; *Parsons & Allen*, at p. 37; *John v. Albion Coal Company*, 18 T. L. R. 27; *Johnson v. Marshal, Sons & Co., Ltd.*, L. J. K. B. 868.)

The Board finds that the employee, the said John P. Holland, received a personal injury arising out of and in the course of his employment, said personal injury not being caused by the serious and willful misconduct of the subscriber; that the said employee is now totally incapacitated for work, and that said total incapacity will continue for an indefinite period; that there is due the employee a reasonable allowance for medical and hospital services and medicines during the first two weeks after the injury; that he is entitled to additional compensation under section 11, (b), Part II., for fifty weeks at \$6.75 a week, this being half his average weekly wage of \$13.50, for the loss by severance of his left leg above the ankle; and to compensa-

tion on account of total incapacity for work, dating from Aug. 4, 1913, the fifteenth day after the injury, to be continued during said incapacity in accordance with the provisions of the act.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 438.

PATRICK WHALEN, *Employee*, BY BRIDGET A. WHALEN, *Next Friend*.

WALSH BROTHERS, *Employer*.

UNITED STATES FIDELITY AND GUARANTY COMPANY, *Insurer*.

INSANITY HAVING CAUSAL CONNECTION WITH THE INJURY
CAUSES INCAPACITY FOR WORK AND COMPENSATION
AWARDED.

The employee received a personal injury by reason of the blistering of his hand in using a wheelbarrow. The wound became infected and two operations were performed. By reason of the injury and the operations and suffering it necessitated, the previously impaired nervous state of the employee was accelerated to the point of insanity, the connection between the personal injury and the insanity being unbroken.

Held, that the employee was entitled to compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Patrick Whalen v. United States Fidelity and Guaranty Company, this being case No. 438 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of David T. Dickinson of the Industrial Accident Board, chairman, William H. Sullivan, 215 Tremont Building, Boston, Mass., for insurer, and James Bodge, 63 Highland Street, Somerville, Mass., for em-

ployee, heard the parties and their witnesses in the Hearing Room of the Industrial Accident Board, Pemberton Building, Boston, Mass., on Friday, Oct. 10, 1913, at 2 P.M.

The committee finds that said employee received an injury arising out of and in the course of his employment on May 7, 1913. The injury was sustained in the course of his work as a laborer in using a wheelbarrow, which caused his left hand to become in an inflamed and somewhat raw condition, raising a blister thereon, and the injury or wound becoming infected. The infection and poisoning developed rapidly, until three days afterwards, on May 10, 1913, the hand had become tremendously swollen, many times its normal size. The pain during the two preceding days had been of torturing acuteness, so that he had been unable to get any sleep. On this date, May 10, 1913, he underwent an operation at the Massachusetts General Hospital for the purpose of saving the hand which was threatened with loss from its extreme condition of blood poisoning. It had to be operated on again on May 12, 1913, for the same reason. Prior to receiving this injury and subsequent experiences he had been in a nervous state from some years in which he had overworked, and had left his previous employment and commenced work with his present employer, Walsh Brothers, for the sake of improving his nervous condition through outdoor work. His average weekly wages at the time of the injury were \$14.40.

Following these two operations the employee visited said hospital for treatment and dressing of the hand daily for two weeks, and after that every other day for two weeks more, and was in such acute suffering during this period of four weeks that he got very little sleep, and the pain was largely a continuation of the agony during the first few days. His nervous system was greatly strained and racked, his self-control and will power reduced, and he went through attacks of extreme depression and weeping. He complained that what he had gone through had broken him all up and that others did not know what he was suffering. About two weeks after he had ceased going to the hospital he had some delusions as to persons being in front of his house, and as to being followed, and about the end of this period of two weeks following the hospital treat-

ment he became somewhat violent, attempted suicide, and appeared dangerous to his wife and family.

On June 30, 1913, he was placed in the Psychopathic Hospital of the city of Boston, and on July 3, 1913, was committed to the Worcester State Hospital, having been pronounced insane by a court having jurisdiction. On June 24, 1913, he was examined by a physician of the insurer as to his hand, but not particularly as to his mind, and then appeared to be in a sane condition, but his insanity as manifested later at the Worcester Hospital was of a type which varied at short intervals from an apparently normal condition of mind to that of plainly marked insanity.

He has been paid by the insurer compensation at the rate of \$7.20 by reason of the injury to the hand and the resulting incapacity therefrom up to Sept. 4, 1913, when it was stopped, the incapacity to the hand having ceased.

The question raised before the committee was whether the insanity was the result of the injury and subsequent operations and suffering applied to his previous nervous state. It was contended by the insurer that the employee had brought on the insanity by worrying over the danger of losing his hand, and from the loss of wages, and the future outlook for himself and family, and that the unfortunate result was therefore due to his own intervening and unreasonable conduct, and was not a direct result of the injury, the operations and his suffering.

In the opinion of the committee, the injury and the operations and suffering it necessitated were a direct material cause of the insanity, working upon his previously impaired nervous state, and the committee so finds. The opinion of Dr. E. V. Scribner, the superintendent of the Worcester State Hospital, was that the injury to, followed by infection of, the left hand so aggravated an underlying nervous state as to make hospital care for his mental condition imperative, and that the injury with its results was an important factor in the man's mental breakdown.

The nervous condition of the man before the injury was not such as to interfere with his last employment, and he then appeared to be in the gradual course of regaining his normal strength.

The committee finds that he has been wholly incapacitated for work by reason of the insanity which resulted from the injury, and that there is due him a weekly compensation from Sept. 4, 1913, when it was stopped, the same to continue until the termination of said incapacity, but not beyond a period of five hundred weeks from the date of the injury, nor to exceed in amount an aggregate payment of \$3,000.

DAVID T. DICKINSON.
JAMES E. BODGE.

In the above entitled cause I agree with the finding of the majority of the arbitration committee in all respects except that I find that the insanity was caused both by the pain and suffering and also by worrying over his condition; I find that the accident was the proximate cause of his insanity, and I agree with the majority of the committee that he is entitled to a weekly compensation of \$7.20 until the termination of said incapacity, but not beyond a period of five hundred weeks from the date of the injury, nor to exceed in amount an aggregate payment of \$3,000.

WILLIAM H. SULLIVAN.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, Pemberton Building, Boston, Mass., Thursday, Dec. 18, 1913, at 10 A.M., and affirms and adopts the findings of the committee of arbitration.

The evidence introduced was substantially the same as that reported by the committee of arbitration, the following new evidence being introduced: —

Dr. Stephen K. Patten, who examined the employee for the insurer, stated that in his opinion he was worrying over family troubles, and that if he could return home to an ideal position where he could have all the money necessary, his condition would improve. As evidence of a nervous disorder, there is in this employee's case the prolonged and unreasonable worry

over his condition, which worry, in the opinion of the doctor, would not have taken place in a reasonable-minded man.

Dr. E. V. Scribner, superintendent of the Worcester State Hospital, wrote to the insurer under date of Sept. 16, 1913, stating: —

As we sum up the patient's condition, we cannot say that the injury was the sole cause of his mental breakdown. It rather appears that the injury, with later infection, etc., brought to a crisis an underlying nervous state, and so aggravated his condition as to make hospital care imperative.

Later, under date of Dec. 8, 1913, Dr. Scribner submitted opinions in reply to questions asked by the insurer as follows: —

1. Did his insanity begin after the injury or prior thereto? It appears from our records that a nervous state existed prior to the injury.

2. Was he insane when he sustained the injury? Our evidence is not sufficient to justify any conclusion on this point.

3. Was insanity coming on for some time, and was it accelerated by the injury? From the evidence it would appear that insanity was coming on for some time and was accelerated by the injury.

4. Did the infection affect his ability to resist the invasion of insanity? Yes, it lowered his resistance against insanity.

5. Would worry or actual physical disturbance play the most important part in causing the insanity? Cannot be determined.

6. Would he have become insane even without the injury? Cannot state.

7. Would reasonable worry cause him to become insane? Reasonable worry would not cause insanity in a normal person.

8. Would melancholy or physical suffering cause him to become insane? Cannot state.

9. Was insanity acquired or aggravated on account of the injury? It cannot be said that insanity occurred as a direct result of the injury, but it aggravated a pre-existing nervous state, and contributed to his insanity.

10. If acquired or aggravated by the injury, was it the direct result, or consequent upon the worry that resulted therefrom? Cannot state.

11. What relation does the worry occurring five weeks sub-

sequent to hospital treatment bear to the insanity, as compared to the pain of the first two weeks after the injury? The morbid worry five weeks subsequent to hospital treatment can be regarded more as evidence of insanity than as a cause of insanity, while the pain of the first two weeks aggravated a previous nervous state.

12. Was he a reasonable-minded man at the time of injury, and was the injury and its direct results such as would cause a reasonable-minded man to worry five weeks subsequent to hospital treatment? From the evidence it appears that he was not normal at the time of the injury. A normal person would not have come to show prolonged mental symptoms as a result of the injury.

Bridget A. Whalen, wife of the employee, testified as to the facts in relation to the accident, to the suffering undergone by the employee, and to his inability to sleep and consequent nervous upset. Her husband had never taken any drug and had not indulged in liquors for at least a year prior to his injury. He earned \$14.40 weekly, and his earnings were sufficient to maintain the family. He had given up his previous employment about ten weeks prior to the accident, needing a rest and desiring to make a change in the nature of his work, the money she had saved keeping the family during the period of his unemployment. He had been working about two weeks when the injury occurred. There had been no occasion for mental worry on his part because of the financial condition of the family, nor for any other reason to the knowledge of the witness.

The Board finds that the personal injury received by the employee, Patrick Whalen, on May 7, 1913, arose out of and in the course of his employment, and that said personal injury and the operations and suffering it necessitated were a direct material cause of the insanity from which he now suffers, accelerating his previously impaired nervous state to the point of insanity, and causing his present total incapacity for work, the connection between said personal injury and said insanity being unbroken. (*Golder v. Caledonian Railway Co.*, 40 Sc. L. R. 89; *Mullen or Malone v. Cayzer, Irvine & Co.*, 1 B. W. C. C. 27; *Willoughby v. Great Western Railway Co.*, 6 W.

C. C. 28; Lloyd v. Sugg & Company, 2 W. C. C. 5; Ystradowen Colliery Co. v. Griffiths, 2 B. W. C. C. 357.)

The Board finds that the employee, the said Patrick Whalen, has been wholly incapacitated for work by reason of the insanity which resulted from the injury, and that there is due him from the United States Fidelity and Guaranty Company a weekly payment of \$7.20 from Sept. 4, 1913, at which time compensation was suspended, until the termination of said incapacity, but not beyond a period of five hundred weeks from the date of the injury, nor to exceed in amount an aggregate payment of \$3,000.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 448.

FRANK STACHUSE, *Employee*.

SYLVESTER TOWER COMPANY, *Employer*.

FIDELITY AND CASUALTY COMPANY OF NEW YORK, *Insurer*.

TRAUMATIC CATARACT TO RIGHT EYE SYMPATHETICALLY
AFFECTS LEFT EYE, CAUSING INCAPACITY FOR WORK.
ADDITIONAL COMPENSATION DUE. COMMITTEE FINDS
THAT COMPENSATION TERMINATES AT A FIXED DATE.
BOARD AWARDS COMPENSATION FOR AN INDETERMINATE
PERIOD.

The employee received a personal injury by reason of a blow in the right eye from a belt which carried power to a boring machine on which he was employed. A traumatic cataract developed which sympathetically affected the left eye and caused incapacity for work.

Held, that he was entitled to compensation to a certain fixed date.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board, revising the findings of the committee of arbitration, finds that the employee is entitled to compensation for an indeterminate period.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Frank Stachuse v.

Fidelity and Casualty Company of New York, this being case No. 448 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of David T. Dickinson, chairman, William S. McCallum for the employee, and John G. Brackett, Esq., for the insurer, being duly sworn, heard the parties and their witnesses at City Hall, Cambridge, Wednesday, Oct. 22, 1913, at 10 A.M., and reports as follows: —

The committee finds that the employee on March 25, 1913, received an injury arising out of and in the course of his employment. A belt which carried power to a boring machine on which he was working broke, and one of its ends struck him violently in the right eye. He was obliged to stop work for several days and went to the Massachusetts Charitable Eye and Ear Infirmary for treatment. He returned to his former work six days later, viz., March 31. He continued going to the infirmary for treatment until the middle of May.

A traumatic cataract was developing during this time as a result of the injury, and on August 7 the employee underwent an operation therefor at the infirmary. He stopped work on Saturday, August 2, apparently as usual, not then knowing he was to have an operation, but the right eye was then so bad that on the following Monday, August 4, he visited the infirmary, found the operation was necessary, underwent it on August 7, and has not returned to work since he left on August 2.

He claims that he is unable to work at his former machine safely, by reason of his left eye having become affected; that he could see and work with his left eye all right until July, when its vision became somewhat impaired by what appeared to him a smoky area and particles, about a foot in front of said left eye.

Dr. Morgan, an oculist of Boston, was appointed by the Board to make an examination of this employee and report thereon to the committee, and his report was before the committee in coming to its decision. This report shows that the injured right eye can simply tell light imperfectly, a condition practically of total blindness, — in other words, below one-tenth of normal vision with glasses; that it probably will never see any better; that the vision of his left eye is $\frac{20}{100} +$; that he can read fine print with the aid of a glass with this

left eye; that in the opinion of this physician he could have worked since he was discharged from the hospital. That the sight of this left eye may be unfavorably influenced by the injured right eye; that this unfavorable influence is probably a sympathetic irritation, not a sympathetic inflammation; that a sympathetic inflammation would be a serious trouble; a sympathetic irritation is of slight importance and only a functional matter; that the smoking of cigarettes by the employee during his absence from work, which was apt to be more than in times when he was working, might have caused the imperfect vision of this left eye.

The committee finds that the vision of the left eye was sympathetically affected by the injury to the right eye, so that its vision was thereby reduced to $\frac{20}{100} +$, and that he was justified in not undertaking to work with this left eye since the operation, by reason of the impairment of the vision of this left eye. The report of Dr. Morgan was made to the committee on Nov. 11, 1913, the date upon his said report of Oct. 25, 1913, being the date when the request was made upon Dr. Morgan for his examination and report.

The committee finds, upon the weight of the evidence, that the employee should be able with safety to return to his work by Nov. 22, 1913, on which date incapacity for work by reason of the injury will cease, except as hereinafter stated.

The average weekly wages of the employee, based upon his actual earnings during the year from March 25, 1912, to March 25, 1913, being the year previous to the accident, were \$11.36. During this period he earned \$556.15, and worked forty-nine weeks. He is entitled to compensation for the period hereinafter stated at the rate of \$5.68 per week, viz., from Aug. 2 to Nov. 22, 1913, — sixteen weeks. The findings as to incapacity, compensation and the termination thereof are made subject to review and change by the Industrial Accident Board, if the condition of the employee warrants such action, in accordance with section 12, Part III., of the act and its amendments.

This compensation is computed in accordance with the act for the time lost from the fifteenth day after the injury. The fifteenth day after the injury was April 8, and no time was

lost after this date until the following Aug. 2, 1913, the employee having worked steadily from said April 8 to and including said August 2, when the operation became necessary.

In addition, the employee is entitled to fifty weeks' compensation at the rate of \$5.68 per week for the reduction of the vision of the right eye to below one-tenth of normal by reason of the injury, said additional compensation to date from Aug. 2, 1913.

DAVID T. DICKINSON.

JOHN G. BRACKETT.

Wm. Shaw McCallum dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties on Thursday, Dec. 4, 1913, at 3 P.M., in the Hearing Room, Pemberton Building, Boston, Mass., and on Thursday, Jan. 29, 1914, at 11.30 A.M., in the Hearing Room, New Albion Building, Boston, Mass., and, revising the findings of the committee of arbitration, finds and decides as follows: —

The hearing on review on Dec. 4, 1913, was postponed by agreement of counsel, upon the understanding that the insurer would furnish suitable glasses to the employee, the said employee agreeing to attempt to perform any work which his employer would provide as soon thereafter as possible.

The evidence before the Board on Jan. 29, 1914, showed that the employee was unable to perform any work by reason of the incapacity due to the personal injury received on March 25, 1913, from Aug. 2, 1913, the date upon which the employee was first incapacitated, until Dec. 22, 1913, at which time he obtained and is now performing work at which he is able to earn an average weekly wage of \$10. He will be partially incapacitated for work on account of said personal injury for an indefinite period.

The Board therefore finds, upon all the evidence, that the employee was totally incapacitated for work by reason of said personal injury until Dec. 22, 1913, and that he was partially

incapacitated for work from Dec. 22, 1913, to Jan. 29, 1914, inclusive, said partial incapacity continuing; that there is due the employee a weekly compensation, on account of total incapacity for work, for a period of twenty and two-sevenths weeks, at \$5.68 weekly, this being one-half his average weekly wages, the amount due for total incapacity being \$115.22; that there is due the said employee a weekly payment of 68 cents on account of partial incapacity for work, this being one-half the difference between the average weekly wages before the injury and the average weekly wages now earned by him, the sum of \$3.79 being due on account of said partial incapacity, making a total sum due in all of \$119.01. Further payments on account of partial incapacity for work are due in accordance with section 10, Part II. of the act. Additional compensation for a period of fifty weeks, at the rate of \$5.68 per week, is also due for the reduction of vision in the right eye to below one-tenth of normal, said additional compensation to date from Aug. 2, 1913.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 449.

GUISEPPE DIMINICO, *Employee*.
COUGHLAN & SHIELS COMPANY, *Employer*.
FIDELITY AND CASUALTY COMPANY OF NEW YORK, *Insurer*.

FAILURE OF EMPLOYEE TO SUBMIT TO AN IMPARTIAL EXAMINATION BY REQUEST OF BOARD CAUSES COMMITTEE TO FIND THAT COMPENSATION CEASED THE DAY FOLLOWING THE DELIVERY OF LETTER.

The evidence showed that the employee had been requested by the Board to report at the office of an impartial physician for examination, as provided by Part III., section 8, of the act, and that he had failed to comply with the request. Other evidence indicated that his incapacity for work had ceased. The employee filed a request for a hearing about four months after he had been notified to report for an impartial examination.

Held, that the employee was not entitled to compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Guiseppe Diminico v. Fidelity and Casualty Company of New York, this being case No. 449 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Joseph A. Parks, representing the Industrial Accident Board, chairman, Felice A. Reppucci of Boston, representing the employee, and L. Raymond Chapman, Esq., of Boston, representing the insurer, heard the parties and their witnesses at the Hearing Room, Pemberton Building, Boston, Mass., Saturday, Oct. 25, 1913, at 10 A.M.

The question at issue was whether or not the injured man was able to work on June 10, 1913, as claimed by the insurer.

Guiseppe Diminico testified that he was injured on March 11, 1913, while in the employ of Coughlan & Shiels Company of Boston. He and another workman were carrying a piece of pipe, and the pipe being heavy it was pushed too hard by the other man, and he fell back on a pile of lumber behind him, injuring his right shoulder, as the result of which he claimed he was not able to work until Aug. 22, 1913. He had been paid compensation up to June 10, at which time the insurer contended he was able to work. He had been treated by Dr. Brine seven times, and had been examined by Dr. R. C. Gwin, for the insurer, on April 30. When compensation ceased he began looking around for a light job, but could not find anything he could do. He claimed that he had not received the letter of June 21, which was sent him by the Industrial Accident Board, requesting him to report for an impartial examination. He is now working, earning \$12 a week.

R. C. Gwin, M.D., testified that he had examined the employee at the request of the insurer on April 30 at his home, 365 North Street, Boston. The injured man had complained of slight pain in the middle of his right upper arm, but there were no objective symptoms upon examination. In testing out the strength of the muscles he found an apparent slight weak-

ness of the muscle of the shoulder. He attributed this lack of strength in the first place to the injury, and in the next place to the rest the arm had been getting, as he had not exercised it enough. He considered that the injury was slight, but that Diminico was not able to do his full work at the time he saw him, but should have been able in two or three weeks from that time, or not longer than a month at the outside.

John M. Morrison, Esq., appearing for the insurer, referring to the letter of June 21 sent by the Board in accordance with section 8, Part III., of the act, stated that the insurer was ready to abide by the report of the impartial physician had an examination been made.

The committee finds that the letter of June 21, 1913, requesting the employee to submit to an impartial examination, was duly mailed, and not having been returned to the office was probably delivered at the residence of the employee. Giving the said employee the benefit of the possibility that the impartial physician might have found incapacity for work to have existed up to the day following the delivery of the letter, the committee finds that the total incapacity for work of Guiseppe Diminico ceased on June 23, 1913, and awards him further compensation from June 10, 1913, to June 23, 1913, inclusive, a period of two weeks, at the rate of \$7.78 per week; that is, \$15.56.

JOSEPH A. PARKS.
FELICE A. REPPUCCI.
L. RAYMOND CHAPMAN.

CASE No. 455.

ENRICO CLEMENTI, *Employee*.
A. & A. RUBBER COMPANY, INC., *Employer*.
TRAVELERS INSURANCE COMPANY, *Insurer*.

EMPLOYEE ENTITLED TO COMPENSATION ON ACCOUNT OF TOTAL INCAPACITY FOR WORK.

The weight of the evidence, medical and otherwise, showed that the employee was totally incapacitated for work by the results of the injury; that his incapacity was due to the amputation of his arm; and that another surgical operation was indicated to relieve a condition of sensitiveness following said operation. *Held*, that the employee was totally incapacitated for work.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Enrico Clementi v. Travelers Insurance Company, this being case No. 455 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of David T. Dickinson, chairman, John A. McCraig for the employee, and William C. Prout for the insurer, being duly sworn, heard the parties and their witnesses at the Board Room of the Industrial Accident Board, Tuesday, Oct. 7, 1913, at 2 P.M.

The committee of arbitration having met, it was agreed by the insurer that the injury received by the employee arose out of and in the course of his employment, and that it had necessitated the amputation of his left forearm. The insurer, however, contended that the total disability which the employee claimed still to be suffering from did not actually exist, and that said employee was able at least to do some considerable work; that the only question, therefore, was that of compensation for the partial incapacity. The payment of compensation to the employee was stopped on June 24, 1913.

The committee finds on the weight of the evidence, medical and otherwise, that the employee still is totally incapacitated by the results of the injury; that his present incapacity is due to the amputation, which was slow in healing, and a retraction and adhesion of the flaps; that the employee is in a state of almost constant pain and suffering therefrom; that the condition has seriously reduced and undermined his nervous and mental energy almost to a point of hysteria; and that another surgical operation is indicated to relieve the sensitive place and to shorten the bones before the man will be able to go back to work.

The committee finds that he is entitled to a weekly compensation of \$5.50 for total incapacity from June 24, when the insurer stopped compensation, to the present time, and during the continuance of said total incapacity.

DAVID T. DICKINSON.

JOHN A. MCCRAIG.

WILLIAM C. PROUT.

CASE No. 457.

FRANK L. FEWORE, *Employee*.

THOMSON-CROOKER SHOE COMPANY, *Employer*.

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., *Insurer*.

EMPLOYEE WHO WAS INCAPACITATED FOR WORK BY REASON
OF INFECTION FOLLOWING COMPULSORY VACCINATION EN-
TITLED TO COMPENSATION.

The employee was vaccinated, as the result of a requirement of the Board of Health, in the factory of his employer. Infection, followed by ulcer, resulted from the vaccination, and the employee was incapacitated for work for a period of nine weeks.

Held, that he was entitled to compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board (Mr. Dickinson dissenting) affirms and adopts the findings of the committee of arbitration.

Appealed to Supreme Judicial Court.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Frank L. Fewore *v.* Employers' Liability Assurance Corporation, Ltd., this being case No. 457 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Edward F. McSweeney of the Industrial Accident Board, chairman, Carl V. Hathaway, Esq., 294 Washington Street, Boston, representing the employee, and W. Lloyd Allen, Esq., of 60 State Street, Boston, representing the insurer, heard the parties and their witnesses at the Hearing Room of the Industrial Accident Board, New Albion Building, Monday, Jan. 5, 1914, at 2 P.M.

The agreed facts in this case are as follows: —

Fewore was employed by the Thomson-Crooker Shoe Company of Lynn, Mass., at an average weekly wage of \$20.

On the twenty-eighth day of January, 1913, it came to the knowledge of the local board of health of the city of Lynn that an employee of the Thomson-Crooker Shoe Company named Comtois, or Richards, was taken ill with smallpox. In December of 1912, a month previous to this time, an employee of the

General Electric Works had been taken ill with the same disease, and it developed that Comtois, or Richards, had visited him, and from him had probably contracted the disease.

The board of health became alarmed, and on Jan. 28, 1913, Chairman Ward and Dr. Lane, together with certain sanitary experts, visited the Thomson-Crooker Shoe Company's plant, and told Mr. Charles Sullivan, superintendent and a member of the firm, that inasmuch as Comtois, or Richards, had been working for this company while in this condition, there was danger of the infection spreading among his fellow workmen, and in consequence all the employees engaged in or about the factory with Comtois must be vaccinated.

Mr. Sullivan at first demurred, saying that it would put his company and its employees to a great deal of inconvenience, but was given this ultimatum by the Lynn board of health, — that unless they were allowed to enter and vaccinate all those who might have come in contact with Comtois, or Richards, and were thus liable to infection, the factory would be quarantined.

Chairman Ward and Dr. Lane went upstairs, and in a general way told the employees that they must either submit to vaccination or be quarantined. All told, there were about 550 men and women employed in the plant, all of whom were vaccinated then or later. It was optional with the employees to either be vaccinated in the factory by the health officials, or by their own family physician, the only requirement being that when vaccinated by their own physician they furnish a certificate of vaccination the next day. The vaccination of the employees lasted two days, and accommodations for administering the vaccine were admittedly poor.

Fewore, as a result of the above-stated circumstances, consented to be vaccinated, and after January 28 continued to work until Feb. 14, 1913, on which day he was obliged to remain out on account of illness which followed as a result of the vaccination. He had a high fever and was very ill. He first thought this was due to a cold, but Dr. Charles McDonald of Lynn, who treated him, found that pus had begun to run from the sore in his left arm, due to infection from the vaccination.

Fewore was visited four or five times by the doctor, and was able to return to work after about ten days. On the 8th of March he noticed that a lump had begun to form between his left breast and the pit of his left arm, and he was again ill and unable to perform any labor from that time until April 22. April 23 he returned to work and has been able to continue since. Fewore returned to work April 23 because the factory had moved its business to Roxbury, and he feared if he did not begin work at this time he might not be able to get it later on; so that he went to work while still indisposed.

It was agreed that total disability existed for a period of exactly seven weeks, not including the first fourteen days after the injury.

The point to be decided by the arbitrators was whether or not, under the circumstances stated, the nine weeks' disability from which Fewore suffered, including the medical waiting period, was due to an injury which arose out of and in the course of his employment. The injured man claimed that it was. The insurer claimed that inasmuch as the employer had no part in ordering the vaccination, and was on an equal basis with the employees who were vaccinated, under the order of the board of health, this relieved the insurer from any responsibility for any disability resulting from the vaccination.

The arbitrators find, as a matter of fact, that the order for vaccination did come from the board of health, but that this order was due to the fact that Comtois, or Richards, who was a fellow employee, had been stricken with smallpox, a disease dangerous to public health, while in the employ of the Thomson-Crooker Shoe Company, and that out of this fact arose the necessity for Fewore's vaccination, as well as that of every employee at the plant, including the superintendent and members of the firm.

The vaccination, as a result of which Fewore was later incapacitated, was directly due to the fact that he was a fellow workman of Comtois, or Richards, who was stricken with smallpox while in the employ of the Thomson-Crooker Shoe Company, and Fewore's injury was not merely a consequence of exposure to the disease which persons in the locality generally

were liable to contract, but grew out of his employment and personal contact with Comtois, or Richards, a fellow workman.

In *McNichols v. Employers' Liability Assurance Corp., Ltd.*, Chief Justice Rugg said that "an injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. . . . The causative danger must be peculiar to the work and not common to the neighborhood. . . . It need not to have been foreseen or expected, but after the event it must appear to have had its origin in the risk connected with the employment, and to have flowed from that source as a rational consequence."

The arbitrators find that as a result of a personal injury arising out of and in the course of his employment, Frank L. Fewore was incapacitated for labor for a period of nine weeks, and is in consequence entitled, under section 5, Part II., of the act, to reasonable hospital and medical services during the first two weeks after the injury, and to compensation at the maximum rate of \$10 weekly, his average weekly wage being in excess of \$20 a week, for seven weeks, or a total of \$70.

EDW. F. MCSWEENEY.

CARL V. HATHAWAY.

Dissenting Opinion.

Facts. — A, an employee of the General Electric Company in Lynn, contracted smallpox. B, who worked in the employer's shop, caught this disease from associating with A out of working hours. The board of health of Lynn, fearful of an epidemic of smallpox, vaccinated the employees of the General Electric Company, the Sorosis Shoe Factory, the employees of the employer, and the members of B's family. In short, an attempt was made to vaccinate all persons known to have associated with B or A who might be likely to come down with the disease. The employee, Fewore, associated with B in his work in the shop of the employer. The board of health ordered the vaccination of the employees of the employer. The employer

neither requested this nor did he willingly submit to it. As a result of this vaccination the employee suffered his injury and now claims compensation.

Law. — This injury did not “arise out of” the employee’s employment. (McNichols Case, 215 Mass. 497; Milliken v. Towle, decided Jan. 8, 1914.)

Mr. Justice Loring in the Milliken case, in construing “arising out of,” said: —

It was held in the McNichols case, 215 Mass. 497, that the provision limiting the personal injuries for which compensation is to be made to those “arising out of” the employee’s employment means that the nature and conditions of the employment must be such that the personal injury which in fact happened was likely to happen to an employee in that employment. In that case it was said that there must be a “causal connection” between the employment and the injury.

Obviously here the “nature and condition of the employment” were not such “that the personal injury which in fact happened was likely to happen to an employee in that employment.”

W. LLOYD ALLEN.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, New Albion Building, Boston, Mass., on Thursday, Jan. 29, 1914, at 10.45 A.M., and affirms and adopts the findings of the committee of arbitration.

The Industrial Accident Board finds that the employee, the said Frank L. Fewore, was incapacitated for work by reason of infection, followed by ulcer, which was the result of compulsory vaccination administered in the plant of his employer, following his exposure to smallpox because of association with a fellow employee, and that this is a personal injury arising out of and in the course of his employment.

There is a causal connection between the conditions under which the work was required to be performed and the resulting personal injury, the said employee having performed his work

in proximity to a fellow workman who was stricken with smallpox. Following exposure to this disease, Fewore, together with all the other operatives, was required by the Lynn board of health to submit to vaccination or be quarantined. As a result of this vaccination to which Fewore submitted himself, infection followed, causing total incapacity for work for a period of nine weeks. The Board finds that this is a personal injury arising out of and in the course of the employment, under the Workmen's Compensation Act.

The Board finds, therefore, that there is due the said employee a reasonable allowance for medical services rendered during the first two weeks after the injury, and compensation at the rate of \$10 a week for a period of seven weeks; that is, the payment of \$70 on account of all incapacity for work.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

I respectfully dissent from the opinion of the majority, on the ground that the injury did not arise out of the employment. If the employer had required the vaccination to be performed, the injury resulting therein might perhaps be held to have arisen out of the employment. This vaccination, however, was ordered by the board of health of the city of Lynn in the performance of its duty to maintain the general public health, and there was nothing in the nature of the claimant's employment which exposed him to the danger of smallpox more than in any other employment.

If compensation is allowed in this case, it would seem that it would have to be in the case of all other contagious diseases that might break out from causes over which the employer had no control.

DAVID T. DICKINSON.

CASE No. 458.

THEODORE JOHN PANASUK, *Employee*.

TAUNTON WOOL STOCK COMPANY, *Employer*.

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, *Insurer*.

INSURER MUST PAY REASONABLE MEDICAL FEE OF PHYSICIAN
SELECTED BY EMPLOYEE UNLESS IT MAKE SOME DEGREE
OF ACTIVE EFFORT TO FURNISH MEDICAL ATTENDANCE.
SUPREME JUDICIAL COURT RULES THAT BOARD HAS
JURISDICTION IN ALL CONTROVERSIES ARISING BETWEEN
PARTIES UNDER THE ACT.

The employee, an illiterate foreigner who was unable to read, write or understand the English language, received a personal injury arising out of and in the course of his employment, and reported it to his foreman. No information was given him as to his rights with regard to medical attendance, nor was any effort made to furnish or offer to furnish medical attendance by his employer or any representative of employer or insurer. It appeared in evidence that a certain typewritten notice in English was posted near a desk in proximity to the place where the employee performed his work. He afterwards called in a physician of his own selection and the insurer declined to pay the bill. The insurer also asked for a ruling in effect that the committee of arbitration had no jurisdiction over a dispute concerning the nonpayment of a bill for medical services.

Held, that the committee had jurisdiction and that the insurer was required to pay the bill of the physician.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to Supreme Judicial Court.

Decision. — The Supreme Judicial Court affirms the findings of the Industrial Accident Board.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Theodore John Panasuk *v.* American Mutual Liability Insurance Company, this being case No. 458 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Dudley M. Holman of the Industrial Accident Board, chairman, Charles G. Washburn of Taunton, representing the employee, and Dr. Thomas J. Robinson of Taunton, and, later, William Edward

Pratt of Taunton, representing the insurer, heard the parties and their witnesses in the Aldermanic Chamber, City Hall, Taunton, Mass., on Friday, Nov. 14, 1913, at 10.30 A.M.

It appeared in evidence that Theodore Panasuk was employed by the Taunton Wool Stock Company; that on March 25, 1913, while the men were engaged in moving bales of cotton, the boss came along and ordered Panasuk to hurry up. He started to work so quickly that the wooden hoop around the bale caught in his hand, and he got splinters in his hand. It was on the left hand and soon began to swell. He worked through the day, and the next morning his hand was so badly swollen that he went to see the boss, who was named Felix. He showed him his hand, and the boss told him it would be all right after a while, and told him to go home. He did not advise him as to his rights in regard to medical treatment, and the man was a foreigner and had to be talked with through an interpreter.

It appeared that the arbitrator for the American Mutual Liability Insurance Company was their examining physician, and the chairman ruled that he must not serve on the case. A recess was taken, and William Edward Pratt was secured to act as arbitrator for the insurer. By agreement of counsel, the testimony which had already been given was read over to Mr. Pratt, and the hearing continued.

On the day after the injury Panasuk, after going to the mill, went home, and his hand and arm were very badly swollen. When one of his fellow countrymen came home from work, he took him to a drug store, and the druggist said that he should go and see a doctor. He went to Dr. Joseph B. Sayles, who attended him.

Mr. Peck, the attorney for the insurance company, asked to have the case dismissed because he claimed that the arbitration hearing was simply to prove the doctor's bill, and referred to the statement of the attorney for the injured man that the case involved was to secure, primarily, the payment of the medical expenses, there being only two days' compensation due the injured man. It appeared in evidence, however, on the testimony of the injured man, that he asked the attorney to secure his compensation by means of a hearing, and when

asked why he refused to take the money which the insurance man had tendered him, he replied that he did not know who he was at that time, and although the interpreter was present, he did not know the interpreter at that time and feared to accept the money.

The papers in the case were made out in due form, and the man had made his mark on the request for compensation and it was properly witnessed. Other than the statement of the attorney for the injured man, there was nothing which should have given color to the suggestion that this was an attempt to collect the doctor's bill through an arbitration hearing, and the attorney explained that his statement had been misinterpreted by the attorney for the insurance company. The chairman ruled that the case should continue, because the evidence showed that the hearing was asked for in good faith by the injured party, and that the law provides that an injured employee shall be entitled to two weeks' medical services without expense to himself, and to compensation, provided his total incapacity for work extends beyond the fourteenth day after the injury; and that this medical attendance was designed by the Legislature in lieu of compensation, and in the majority of cases the cost of medical services during the first two weeks would naturally be far in excess of any compensation which the injured man might have received; and that not having been provided suitable medical attendance by his employers, he was entitled to secure his own physician and should not be left to pay that out of his own pocket; and that the two must run together, that is, that he was entitled to medical attendance during the first two weeks, and to compensation for such time as he was totally incapacitated beyond the two weeks' waiting period provided by law.

It appeared in evidence that John Rosie was present when Panasuk was injured, and was also present the next day when the boss told him that he had better go home; and that the boss did not tell him where to go to get medical attendance.

On the testimony of Dr. Joseph B. Sayles, a practicing physician for twenty-five years, it appeared that on March 26, 1913, Panasuk came to his office with a septic hand. It was called a palmar abscess. The man was accompanied by an

interpreter, and with much difficulty he was able to converse with him. He told him that it was necessary to have the hand opened. He refused at that time to have it opened, so the doctor washed it and bandaged it and told him to come the next morning. The next morning the hand was swelled still more, and the man finally gave his consent to opening the hand. Upon opening the hand, he found a sliver of wood three-quarters of an inch long, in the shape of a match tapering at the point. Dr. Sayles testified that on the first day when he came in he asked him why he did not go to the mill doctor, but he could not make him understand, and there was urgent necessity for something being done to prevent the man from having a very serious condition arise, which might require the amputation of the hand or arm; that he wrote to the superintendent of the company that he had such a patient under the Workmen's Compensation Act; that the man came every day and had the hand flushed out for eleven consecutive days and the wound was dressed. On the eleventh day the doctor told him not to come any more, but to see what nature would do for it, and then come in in three or four days. He never came back, but went to work.

There was no evidence introduced by the attorney for the insurance company other than that the man had said that he had been to the doctor only six times, this evidence being offered by Joseph Agurkis, a fellow employee. Upon examination it was found out that Panasuk was told by fellow workers at the mill that he must not tell how many times the doctor attended to him, and consequently he had said that it was only six times, but he admitted that that was not the truth, and he told that because they said if he said more than that he would be discharged.

We find, therefore, that Panasuk received an injury arising out of and in the course of his employment; that his average weekly wage was \$8.25; that he was entitled to recover compensation at one-half his average weekly wage during the period of his total incapacity, extending beyond the two weeks' waiting period provided by law, which was two days; that he was entitled to free medical service under the act during the first fourteen days after the injury, counting the day of the

injury as one of the fourteen days; and that in the absence of any knowledge imparted to him by his employers that they had a physician, or by any direction to him to go to the mill doctor, he was entitled to select his own physician.

DUDLEY M. HOLMAN.
CHARLES WASHBURN.
WM. E. PRATT.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, Pemberton Building, Boston, Mass., on Thursday, Jan. 1, 1914, at 2 P.M., and affirms and adopts the findings of the committee of arbitration.

The evidence shows that a "Notice to Employees," in type-written form, was posted in a glass case near a desk, about 6 feet from the floor. The desk stood directly in front of the place where the employee had worked. The notice read as follows: —

NOTICE TO EMPLOYEES.

The Taunton Dye Works and Bleachery Company has provided for payment to injured employees by the American Mutual Liability Insurance Company, 50 State Street, Boston, Mass., the compensation allowed by Part II. of chapter 751 of the Acts of 1911 and amendments thereto.

TAUNTON DYE WORKS AND BLEACHERY COMPANY.

JUNE 26, 1912.

Attached to this notice was the following, also in type-writing: —

DOCTORS TO WHOM TO GO IN CASE OF ACCIDENT AND RECEIVE FREE MEDICAL TREATMENT.

1. Dr. T. J. Robinson, 56½ Broadway, telephone 525.
2. Dr. T. F. Clark, 62 Broadway, telephone 211.
3. Dr. A. S. Deane, 60 Broadway, telephone 984-M.

The Taunton Wool Stock Company and the Taunton Dye Works and Bleachery are two separate companies, Panasuk being employed by the former company.

The employee, Panasuk, was an illiterate foreigner, who was unable to read, write or understand the English language, and he had no notice, and no information was given him, as to how he should proceed in case of accident, nor had he been informed as to the manner in which he could procure medical attention.

The said employee reported the injury to his foreman, and the said foreman did not advise him as to his rights with regard to medical attendance, nor was any effort made to furnish or offer to furnish medical attendance to the injured employee. The employee was instructed to go home by his foreman, who advised him that his hand would be all right in a short time. After his arrival home the said employee noticed that his hand and arm were badly swollen, and following the advice of a fellow countryman he called upon a druggist, who in turn advised him to see a physician. He was attended by Dr. Joseph B. Sayles, who could converse with him only through an interpreter. A very serious condition was found, there being danger, for a time, of amputation. A sliver of wood was removed and the hand flushed daily for eleven consecutive days. Later the employee returned to work. He was totally incapacitated for a period of sixteen days as a result of the injury. The evidence shows that the superintendent of the Taunton Wool Stock Company had notice from Dr. Joseph B. Sayles that he was attending the said employee, and that no offer was made to furnish other medical attendance.

The Industrial Accident Board finds upon this evidence that the insurer, the American Mutual Liability Insurance Company, did not furnish medical attendance to the employee, the said Theodore John Panasuk, and that there is due the said employee from the said insurer the sum of \$22.50 on account of medical services rendered by Dr. Joseph B. Sayles during the first two weeks after the injury, to wit, from March 25, 1913, to April 7, 1913, and two days' compensation, at half the employee's average weekly wage of \$8.25, that is, two-

sevenths of \$4.125, which is \$1.44, the total amount due being \$23.94.

The requests for rulings hereto annexed are refused in so far as they are inconsistent with these findings.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. McSWEENEY.
JOSEPH A. PARKS.

Insurer's Requests for Ruling on Review.

1. The Industrial Accident Board has no jurisdiction in this matter.

2. Under the Workmen's Compensation Act no arbitration committee can be formed for the purpose of passing upon bills of a physician.

3. The insurer has complied with the provisions of the act with reference to furnishing medical attendance when it has made arrangements with a competent physician to attend employees, and has posted in the employer's plant a notice with information regarding that physician's address.

4. The employee is not entitled under the act to select his own physician at the expense of the insurer.

5. If there is posted in the employer's plant a notice containing the names and the addresses of physicians with whom the insurer has arranged to give medical attendance to injured employees, they cannot at the expense of the insurer select their own physician.

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY.

By its Attorneys,

SAWYER, HARDY & STONE.

Decree of Supreme Judicial Court on Appeal.

RUGG, C.J. This is a proceeding under the Workmen's Compensation Act. Panasuk received injuries arising out of and in the course of his employment for Taunton Wool Stock Company. A splinter became imbedded in his hand, resulting

in swelling, pain, and a "palmar abscess," which required a surgical operation, and thereafter cleansing and dressing for several days. Panasuk was found by the Industrial Accident Board to have been "an illiterate foreigner, who was unable to read, write or understand the English language," and he had no notice, and no information was given him, as to how he should proceed in case of accident, nor had he been informed as to the manner in which he could procure medical attention. There was posted in a glass case near a desk in front of the place where the employee worked the following: —

NOTICE TO EMPLOYEES.

The Taunton Dye Works and Bleachery Company has provided for payment to injured employees by the American Mutual Liability Insurance Company, 50 State Street, Boston, Mass., the compensation allowed by Part II. of chapter 751 of the Acts of 1911 and amendments thereto.

TAUNTON DYE WORKS AND BLEACHERY COMPANY.

JUNE 26, 1912.

Doctors to whom to go in Case of Accident and receive Free Medical Treatment.

1. Dr. T. J. Robinson, 56½ Broadway, telephone 525.
2. Dr. T. F. Clark, 62 Broadway, telephone 211.
3. Dr. A. S. Deane, 60 Broadway, telephone 984-M.

The Taunton Wool Stock Company, for which Panasuk worked, and the Taunton Dye Works and Bleachery Company are separate corporations. Panasuk reported his injury to the foreman, who did not advise him respecting his right to medical attendance, and no effort was made to furnish medical service. Later, through the assistance of a fellow countryman, he went to the office of Dr. Joseph B. Sayles, who found that there was urgent necessity for an immediate operation to prevent a serious condition which might require amputation of the hand or arm, and who gave the necessary treatment. He wrote to the superintendent of the employer that he had such a patient under the Workmen's Compensation Act. But no attendance was sent to the employee. The only question raised is whether the amount paid to Dr. Sayles for medical attendance by the employee during the first two weeks after his injury can be recovered.

It is contended that the arbitration committee and the Industrial Accident Board have no jurisdiction to consider this question. That contention is untenable. The purpose and scope of the Workmen's Compensation Act is to include all matters touching the relations between the employer and employee arising under the act. It is a remedial statute and should be given a broad interpretation. All controversies arising between the employee and the employer and the insurer under the terms of the act are to be settled in accordance with the procedure there established. This follows from general considerations touching the nature of the legislation and the aim intended to be accomplished by it. A critical examination of Part II. of the act, which relates to "payments," confirms this view. Section 1 provides that when an employee receives a personal injury arising out of and in the course of his employment he shall be paid compensation "as hereinafter provided." Sections 2, 3 and 4 relate to "compensation." Section 5 has to do with the medical and hospital services and medicines, and section 6 with the payments based upon the average weekly wage. The collocation of section 5 and its subject-matter show plainly that its benefits are a part of the compensation to which the workman is entitled.

Section 5, Part II., of the act is as follows: "During the first two weeks after the injury the association shall furnish reasonable medical and hospital services, and medicines when they are needed." The plain purpose of this section is to impose upon the insurer the duty of providing these necessities for the workman. Manifestly the workman is not permitted generally to select his own physician nor hospital, but is to accept that which the law thus requires to be provided for him.

The point of difficulty is whether the insurer in fact did "furnish reasonable medical . . . services" as required by the act. The point has not been raised that it has not been found by the Industrial Accident Board that the notice quoted above was made for the benefit of the employer, the Taunton Wool Stock Company, for which Panasuk worked, nor that the statement, if made on its behalf, was true. Counsel for the employee and the insurer have argued as if this question of law is open, and we so treat it.

The obligation to furnish medical and hospital services for

the first two weeks after the injury is imposed on the insurer by the express words of the act. This duty must be performed, or reasonable efforts made to that end, before the statutory obligation is satisfied. "Furnish" means to provide or supply. Its significance may vary with the connection in which it is found. It is used here to describe a duty placed upon an insurer respecting a workman who receives "a personal injury arising out of or in the course of his employment." Such a person manifestly is presumed by the act to be under more or less physical disability, and hence not in his normal condition or ability to look out for himself. The word "furnish" in such connection imports something more than a passive willingness to respond to a demand. It implies some degree of active effort to bring to the injured person the required humanitarian relief. Reasonably sufficient provision for rendering the required service must of course be made. Then either express notice must be given to the employee, or there must be such publication or posting of the information as warrants the fair inference that knowledge has reached the employee. If the insurer has made adequate arrangements for the care of those to whom the duty is owed in the event of injury, and then by conspicuous notices suitably posted in places frequented by the employee, in a language capable of being read by him, has given full information of that fact, and directions as to steps to be taken by an injured person in order to avail himself of these arrangements, a very different question would be presented. This might go a long way toward proving compliance with the requirement of the statute. But in the case at bar the notice appears not to have been of a character to challenge attention, although perhaps it might have been enough if the employee had been able to read the English language. The insurer has readily accessible means for ascertaining the nationality of employees insured by it and their degree of intelligence. If among them are those who cannot read or speak the English language, this circumstance requires greater effort on its part in order to comply with the statute. (*Beers v. Isaac Prouty Company*, 200 Mass. 19.)

Under all the conditions disclosed no reversible error appears.

Decree affirmed.

CASE No. 464.

LILLIAN PIDGEON, *Employee.*

J. EAMES & SONS, *Employer.*

MARYLAND CASUALTY COMPANY, *Insurer.*

EXISTING NERVOUS CONDITION AGGRAVATED BY PERSONAL
INJURY ARISING OUT OF HER EMPLOYMENT. EMPLOYEE
ENTITLED TO COMPENSATION.

The evidence showed that the employee received a personal injury arising out of and in the course of her employment while lifting a crate of bottles, and that this injury had materially accelerated and aggravated a nervous condition which existed at the time; also, it was in evidence that the employee was doing work which was entirely beyond her physical ability to perform.

Held, that the employee was entitled to compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Lillian Pidgeon v. Maryland Casualty Company, this being case No. 464 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of Edward F. McSweeney, chairman, James T. Carter, Esq., for the employee, and Martin F. Connelly, Esq., for the insurer, heard the parties and their witnesses in the Selectmen's Room, Town Hall, Holliston, Mass., Wednesday, Oct. 22, at 10.15 A.M.

Miss Lillian Pidgeon, now living at 23 Union Street, Natick Mass., was, on May 12, 1913, employed by J. Eames & Sons, vinegar makers, at East Holliston, Mass.

Miss Pidgeon's work consisted of filling, labeling and loading vinegar bottles on trucks, pushing the trucks to the other side of the room, and unloading the same. There were 18 bottles to a crate, and 8, and sometimes 10 and 12, crates on a truck. Besides doing this work she tin-foiled, packed and, in fact, did everything required to be done about the place. On May 12, 1913, while lifting one of the crates from the truck, she felt something in her right side snap, and from that time it pained continually. She spoke of the injury to the mother of the Eames Brothers, her employers, and told her how much it

pained her. Mrs. Eames advised her to consult a doctor at once, and see if something could be done to relieve her.

Each box of bottles, when filled with vinegar, weighed about 50 pounds, and the injured employee lifted these boxes or crates from the truck about a height of 32 inches when unloading them. The wheeled truck weighed about 150 pounds.

On the particular day on which the accident happened she was all alone in the factory, Mr. Eames being away on business. It frequently happened that she would be alone there doing the work, sometimes two days during the week. While alone she undertook to do most of the heavy lifting and pushing, but when either of the Eames Brothers was around they assisted her.

Mr. Ball, representing the Maryland Casualty Company, said that compensation in this case had been paid up to Aug. 24, 1913, and it was then stopped because the insurance company believed her disability had ended.

The question at issue is whether or not Miss Pidgeon has a hernia resulting from this injury on May 12, 1913, and whether or not the disability still continues.

Dr. Burke of Natick testified that he had recently treated Miss Pidgeon on two occasions, and each time found her just recovering from the effects of nervous collapse or "hysterical convulsions." He did not examine her for hernia, but believed that the work she had done, together with her general poor health, might easily bring about this result; he also testified that she is suffering from neurasthenia.

By agreement between the attorney for the insurer and the employee it was agreed that Miss Pidgeon should be examined by Dr. Francis D. Donoghue, and a copy of his report is as follows: —

864 BEACON STREET,
BOSTON, MASS., Oct. 28, 1913.

Industrial Accident Board, R. E. GRANDFIELD, Secretary, Boston, Mass.

DEAR SIR: — Lillian Pidgeon, J. Eames & Sons, Maryland Casualty Co.; age, twenty-six years, single; residence, 23 Union Street, Natick, Mass.; occupation, worked at cider mill of J. Eames & Sons; attending physicians, Dr. A. R. Newhall, Holliston, Mass., and Dr. M. F. Burke, Natick, Mass.; date of accident, May 12, 1913; date of examination, Oct. 28, 1913.

Diagnosis. — Bulge of an old operation scar in a person of sub-standard nerve resistance; an emotional neurotic. She gives the history that on

May 12 she was pushing around heavy trucks and unloading contents, and between 11 and 12 o'clock was taking a crate, weighing about 50 pounds, from a truck. She started to put it on the floor, and a sharp pain took her in the right side. Says she had felt pain in the right side two or three days before. She kept on working for a couple of weeks and the trouble continued on the right side. Some time in May she saw Dr. Newhall. She says on May 12 there was no vomiting, but that night she called up the family because of severe pains. Says that when Dr. Newhall saw her he found a bunch on the right side and strapped the side and advised against a truss. Has done no work since. Says she cannot work; has no strength. Some nights she sleeps, and some she doesn't. Dr. Burke had history. Says she ought to go to a sanitarium.

Past History. — Says she was operated on three years ago in Deaconess Hospital. Dr. Hutchins operated and Dr. Langnecker assisted. She said she had a fall through a floor when she was twelve or thirteen years old, straddled a beam. This displaced the uterus. At the operation, the appendix was taken out. Says part of an ovary was removed and "the uterus was fixed." Two years after the operation went to work in a cider mill. Before going to work had taken care of three children for one summer. Her monthly sickness was very painful before the operation, got over it, but since this last accident there is pain each time. Had four to six spells since, spells corresponding to monthly sickness. Says her mother is obliged to rub her to keep her from having spells in the morning, and only has them when she tries to get up. Weight, 120 pounds, going to factory to work; now 114 pounds. Height, 5 feet 5 or 6 inches. Bowels move every day since Dr. Burke gave medicine. Says the pain now at time of monthly sickness compares to what she had eight or nine years ago. She has a slight amount of flow. She had these spells before the first operation, and went a year after the operation without a spell. The first spell was June 28.

Examination shows a spare, pasty-complexioned girl, an emotional neurotic type. Tongue clean, slightly tremulous, but protrudes to the left. Romberg is absent. Knee jerks are present. Pupils equal and react to light and distance. Complains of trouble with her eyes after reading.

Standing examination of her abdomen shows a scar just about the pubes, in which there is a protrusion on cough, in the right-hand scar, just above the groin. Appears to be a separation of an operation scar. Lying on back no protrusion. Scar is thin at this place. Kidney can be palpated.

Examination by vagina. Uterus is in low position and larger than normal. Slight enlargement of the thyroid gland of the neck. This is a woman who is of a marked neurotic, emotional temperament, who has done very little work, and who gives now a story of spells. She has a bulged scar in the groin, but I do not see how this has anything to do with her general condition, which is rather a marked nervous upset.

The story of the spells coming on and the biting of the tongue, with protrusion of the tongue to the left, shown by examination, indicates the possibility of the beginning of epilepsy from some source of irritation in the right side of the head.

I do not see any relation between the accident that she described and her present condition, unless the accident called her attention to the bulge in the scar, about which she has continued to worry. She is a woman of marked introspection; as far as the bulged scar is concerned, it should not, of itself, make any particular trouble. It could be well controlled by a pad, either on a belt, or on her corsets, and there is no reason, as far as that is concerned, why she should not work. If her mind could be fixed upon work, and if some occupation could be found that would interest her, her mental condition would undoubtedly improve.

Very truly yours,

FRANCIS D. DONOGHUE, M.D.

In this case the arbitrators are dealing with a girl of subnormal make-up. It is not clear that the injury is the entire cause of the redevelopment of the illness from which she is suffering, but there seems to be a clear connection between the injury and the recurrence. It appears that she is not suffering from a primary hernia, but a bulge in an old scar from an operation, which may be controlled by a truss or some appliance attached to her corsets.

The evidence shows, in addition, that this girl was doing work which was entirely beyond her physical ability adequately to perform. The lifting of a 50-pound box from a 3-foot truck to the floor was not suitable work for the injured employee, and from the evidence it appears that this moderate protrusion in the old scar may be due to the continued strain of her employment.

Under the circumstances, the arbitrators find that while the insurance company should not be obliged to pay this girl solely because of her subnormal nervous make-up, there is here an industrial injury which has aggravated her existing nervous condition, and she is therefore entitled to a reasonable period of disability, and the committee finds that Lillian Pidgeon is entitled to reasonable hospital and medical services from May 12, 1913, the date of the injury, up to and including May 25, 1913, and to compensation from May 26, 1913, up to and in-

cluding Dec. 1, 1913, a period of twenty-seven and one-half weeks, at the minimum rate of \$4 a week, a total of \$108.57 less the amount already paid.

EDW. F. MCSWEENEY.

JAMES T. CARTER.

MARTIN F. CONNELLY.

CASE No. 469.

TONY REVITA, *Employee.*

CROWE & WALSH, *Employer.*

ROYAL INDEMNITY COMPANY, *Insurer.*

**EMPLOYEE NOT ENTITLED TO DOUBLE COMPENSATION,
INJURY NOT OCCURRING BY REASON OF THE SERIOUS
AND WILLFUL MISCONDUCT OF HIS EMPLOYER.**

The employee claimed double compensation, alleging serious and willful misconduct on the part of the subscriber through a person exercising superintendence, — a foreman. The evidence shows that the injury was not occasioned by the serious and willful misconduct of the foreman, the latter's act in ordering the said employee to resume the work of digging out a blast hole not being willful or deliberate. It could not be said that the foreman had any idea of the serious consequences which resulted from the carrying out of his instructions. The blast had been carefully inspected immediately after the explosion by a party of five, including the foreman, one of the employers and the employee, and as a result of this inspection the two former were satisfied that there had been a perfect explosion in each of the blast holes.

Held, that the employee was not entitled to double compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Tony Revita v. Crowe & Walsh, this being case No. 469 on the files of the Industrial Accident Board, reports as follows: —

The arbitration committee, consisting of James B. Carroll, chairman, representing the Industrial Accident Board, James Fallon, Esq., representing the employee, and Irving H. Gamwell, representing the insurer, heard the parties and their witnesses at the Aldermanic Chamber, City Hall, Pittsfield, Mass., Friday, Nov. 14, 1913, at 10.30 A.M.

In this case the employee claimed that he received his injury through serious and willful misconduct on the part of his employer, and so is entitled to double compensation.

It was agreed that the employee was entitled to seventy-five weeks' compensation, at \$7.29 per week, for the loss of his hand and fingers, and also compensation for incapacity while incapacitated for work. The only question presented to us for decision is this: Is the employee entitled to double compensation because of the serious and willful misconduct of his employer or of the employer's superintendent?

The evidence was substantially as follows: —

Mr. Tony Revita testified as follows: —

On the sixth day of August, at about 9.20 A.M., while working for the firm of Crowe & Walsh, I was seriously injured. A number of other men and myself were working on the State road. There is a ledge on the east side of the road which had to be blasted. The night before the accident eighteen holes were made and dynamite put in them. All but three of these went off. These holes were about 2½ feet from the edge of the ledge and were about 10 feet deep. After the holes were made they were half filled with dynamite and the rest with dirt. A short while after I started to work on the morning of the 6th, the boss, Tom Flynn, told me to go and dig up the middle hole because he wanted to reload it. I said I was afraid to, but Mr. Flynn assured me that there was no danger, and insisted on my digging out this hole. He told me to take the pump and some water and go and dig out this hole, so I obeyed. I had only been working ten or fifteen minutes when Mr. Dan Walsh came to me and told me that I must not dig out the hole because he was afraid somebody would get hurt. When Tom Flynn saw that I was not working, he told me to hurry up and clean out the hole, and although I said Mr. Walsh told me to stop, Mr. Flynn ordered me to go on and finish the job. I went to the hole again and began to dig the dirt with the pump and water, and when the hole was about 3 feet deep the dynamite exploded, taking off my left arm to the elbow and three fingers of my right hand, also badly scratching my face. After the explosion I fell to the ground and was taken to the hospital at Pittsfield. During my conversation with Tom Flynn, 15 or 20 men were working 6 or 8 feet away. Charlie Carmello was working at a hole near by. When I worked for Crowe & Walsh, about a year ago, I did no blasting at all, but during the two months I worked for him since I came back this last time I have done some of this work. My regular work consisted of running a steam drill, but I sometimes loaded the dynamite on to the team and brought it to the boss. Mr. Flynn usually put the dynamite in the holes, but I very often filled them up with dirt. I never put any dynamite in the holes. Mr. Flynn always puts the caps

into the holes, but I very often put the caps on. Mr. Flynn put in the cartridges in the eighteen holes the night before the accident, and after the holes were covered up, two wires came out from each hole, and all the eighteen holes were connected with wires. A battery was attached to these, and when Tom turned the current on, all but three of the eighteen holes went off. After the explosion, Mr. Walsh, Mr. Flynn and I went around and looked at the different holes, and we found the wires still in the hole at which I was afterwards hurt. The wires were in the way when I was digging out the hole, so I pulled them out, but the cap did not come out. To get these out, I first had to dig down about a foot, then I could pull them out very easily.

Mr. Wright explained at this time that what Mr. Revita calls dynamite is an explosive known as Trojan powder.

Mr. Charlie Boyle (*alias* Pojliei) testified as follows: —

I was working near the hole that Tony was to dig, so heard the conversation between Tom Flynn and him. I heard Tom telling Tony to go and clean out the hole and Tony said he didn't want to, because he was afraid. The boss told him there was no danger, and to go and get a pail of water and pump and clean out the hole. I did not understand much English, but I understood what the boss said to Tony. At the time of this conversation between Tony and Mr. Flynn I was only a few feet away, but at the time of the accident I was about 150 feet away, working on the crusher. The accident to Tony happened about a quarter after 9.

Mr. Salvatore Botta testified as follows: —

I was near enough to Tony to hear the conversation between him and Mr. Flynn, the boss. I overheard Tom telling Tony to go and dig out the hole. Tony said he didn't want to do this because he was afraid, but Tom told him not to be afraid, to get a pail of water and pump and work in the hole. This was all I heard of the conversation because I went to work on the crusher, which was some little distance off. I did not see the explosion, but heard the noise. I cannot speak much English, but I could understand about the pail, and the other men told me what the boss said.

Mr. Daniel Walsh testified as follows: —

I employed Tony Revita and placed him under Tom Flynn. A short time before the accident I had a conversation with Tony in regard to his digging out one of the holes that I thought was dangerous. I told Tony to keep away from the hole and to go down to the lower parts of the road and load some stone. I also told him not to use the iron pump, but to get a stick when he wanted to dig out holes. The night before the accident powder was put in eighteen holes. During the explosion of these I stood about a thousand feet away. The rock was broken very irregularly in

some places, showing that the strata was different or else there was not enough powder put in some of the holes. Every hole indicated, however, a perfect explosion, although the tamping was not completely destroyed in every hole. After the blast, Mr. Flynn, a Mr. Stakes and his son, Tony, Charlie and myself went around to see the blast and look at its effects. There must have been a partial explosion in the hole where Tony was hurt because there is a slight shell around this hole, a piece of stone just about 4 inches in circumference. The tamping was not completely destroyed in every hole. Tony was hurt on the third hole from the end going towards the south. If there had not been a complete explosion in every hole, some section of the rock would remain untouched, which was not the case. Even if there is a poor circuit, it very rarely happens that one hole is missed and the rest go off. In my experience I have never known of a case where one hole has been missed and the rest gone off. After the blast I found a couple of sticks of dynamite in one of the holes, but this is a very rare thing. In my thirty-one years' experience I have only found powder in the holes after the explosion three or four times. When I saw Tony digging out the holes I told him to stop because I did not want to injure more than one man at a time, and did not want this work done until after the other men had gone home. I also told Tony that he must not use the iron pump because using any kind of an iron implement in this kind of work is against the rule. I thought it dangerous for Tony to work on this hole because there is always a chance of running on unexploded powder. There is always a chance of explosion where there is dynamite. After examining the holes on the night of the blast I concluded that there had been a blast in every hole. The hole at which Tony was hurt showed a partial explosion, because the earth was down a foot or 18 inches below the rock, and if there had not been an explosion it would have been up to the top of the rock. The dynamite was down perhaps 2 or 3 feet in the rock, but there is no way to tell exactly. The rock was shattered all around this hole, and the dirt in the hole was loose, and was thrown out of the hole a distance of 12 to 18 inches from the top. After I told Tony to stop working at this hole he started to work about 10 feet away from it, and then I left him to go to Mr. Stakes' telephone. There were a number of men working around Tony. I was just returning from Mr. Stakes', and was about 600 feet off, when the explosion occurred. My intention was to have this hole dug down a couple of feet and then put in a second charge so that the rock would be thrown clear at the next explosion.

John Lintino testified as follows: —

At a little after 9 o'clock on the morning of the 6th of August, while I was working with Tony, Tom called Tony up to the banking and told him to dig out the hole. The hole that exploded was right close to me. I could not understand much English, so did not get much of what the boss said to Tony.

Salvatore Sano testified as follows: —

I was one of the gang of men working near Tony. I did not hear the conversation between Tom, the boss and Tony, but I saw Tony going up to the hole with a pail of water.

Charlie Roberts testified as follows: —

Tony and the rest of the men were working together when Tom, the boss, came and called Tony, and told him to get a pail of water and a pump and to dig out the hole. Tony refused because he was afraid, but Tom told him to dig out the hole, that there was no danger. I could not talk English, but I could understand what the boss said to Tony. This conversation was about 8.30 in the morning.

Dominic Fertio testified as follows: —

I was working about 12 feet away from Tony when Tom called Tony and told him to go and start on the hole. Tony said he was afraid to work on the hole, but Tom said to get a pail of water and pump and start digging, that there was nothing to be afraid of. I could not talk much English. I think it was 9 or a little after that Tony and Tom had this conversation.

Mr. Thomas Flynn testified as follows: —

I was employed by Crowe & Walsh as foreman around the crusher. There was quite a little blasting done on this job, and I had had charge of it about two months before the accident to Tony Revita. I have worked off and on about twenty-six years at blasting, so thoroughly understand it. Tony's work was usually on a steam drill. It took two men to drill a hole and Tony was one of them. After some time Tony was able to run the drill himself, so his pay was increased from \$2 to \$2.50 a day. When Tony was not working on the drill he very often helped with the blasting, i.e., he helped load the holes. Tony never put the dynamite in any of the holes, however. I used to do that myself. I sometimes let Tony put on the caps. Tony, two other men and myself loaded all the eighteen holes the night before Tony's injury. After the blast, Tony, Charlie, Mr. Stakes and Mr. Walsh went around with me to look at the different holes. From the looks of the hole at which Tony was hurt I thought the powder was gone. When I examined the holes I found the wires in this hole, so remarked to Tony then that the next morning we would reload the hole. In my judgment there was a complete explosion in every hole. There could not possibly be more than two or three sticks of dynamite found in the hole after the explosion, although there were ten or twelve sticks put in the hole before the explosion, because men that were working 10 feet away did not feel the shock. I did not know there was any dynamite in the hole, but if I had known, I would have dug it out with water and a stick myself and would not have sent Tony to do it. The first thing in

the morning I told Tony to dig out the holes and to load them over again. I then went over to the crusher to do some work, and when I came back I found Tony was not working on the hole. Tony said that Dan (Mr. Walsh) told him to go away and not work there, but I told him to go ahead and dig out the hole. I thought that Tony was not telling me the truth, and that he did not have any talk with Mr. Walsh. There were about 4½ feet of tamping in the hole that injured Tony. After the first explosion there was a foot or more blown out. When I told Tony to dig out the hole I did not tell him what to take with him. I was right over the hole when I directed him to dig it out. I was sure there wasn't any powder in the hole or I would not have sent Tony to dig it out. This was the first time I ever saw powder after a blast. Sometimes it happens that there is powder which has to be dug out and recharged. I did not see this accident happen. Upon examining the holes the night before, either Charlie or Tony pulled out a wire out of that hole. The pump that Tony was using was to clean out holes before the blast. If I had done the work myself I would have used this pump because I didn't think there was any dynamite left in the hole.

Dominic Campino testified as follows: —

I worked for Mr. Walsh on the job on which Tony Revita was hurt, but at the time of the conversation between Mr. Flynn and Tony I was some little distance off, so did not hear anything that was said.

On this evidence we find that the employer was not guilty of serious and willful misconduct, and we further find that Flynn, the superintendent, on the night before the employee was injured, examined the holes where the powder had been placed, and came to the conclusion that it had all exploded, and the next morning put Tony Revita to work cleaning out the holes, supposing the blast had exploded and that there was no danger in so acting, and we find that he was not guilty of serious and willful misconduct, and rule that the plaintiff, the employee, is not entitled to recover.

The employer filed the following requests for rulings: —

1. On all the evidence in the case no finding can be made that the employer was guilty of serious and willful misconduct.

2. On all the evidence in the case it cannot be found that Flynn, the superintendent, was guilty of serious and willful misconduct.

3. On all the evidence it cannot be found that Flynn was guilty of any negligence in forming the judgment that he did that the hole which afterwards injured Revita had exploded.

4. The plaintiff cannot recover double damages in the case because he received his injury in consequence of disregarding a distinct warning of the accident which caused his injury.

5. The plaintiff cannot recover double damages in this case because he disregarded the express orders of his employer when he undertook the work that caused his injury.

6. The plaintiff cannot recover double damages in this case because when he did the work which caused his injury he was doing it in the face of an express warning of the danger involved in it, and in disobedience of express orders given him by his employer.

7. The plaintiff received the injury for which he now claims double compensation because he not only expressly disregarded a warning of danger, but also an express order given him by his employer, and proceeded voluntarily to expose himself to a danger which his own testimony shows he appreciated.

8. If the plaintiff's negligence contributed to his injury he cannot recover even though the superintendent, Flynn, was guilty of serious and willful misconduct.

9. If the plaintiff's negligence caused his injury he cannot recover even though the superintendent, Flynn, was guilty of serious and willful misconduct.

10. If the injured man was guilty of gross negligence he cannot recover double compensation even if the misconduct of Flynn was serious and willful.

11. The acts of Flynn after the blast, in investigating results to see if there had been a complete explosion, would free him certainly from gross negligence, which must exist to bear out the charge of willful misconduct.

The first and second requests are given, the others are refused.

This decision and all findings regarding compensation or the existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III., of the Workmen's Compensation Act, and the general provisions of said act and its amendments.

JAMES B. CARROLL.
JAMES FALLON.

Irving H. Gamwell dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties on Thursday, March 5, 1914, at 2 P.M., and affirms and adopts the findings of the committee of arbitration.

No new evidence was introduced, the case being submitted on the evidence before the committee of arbitration, the only question involved being that of serious and willful misconduct on the part of a person exercising superintendence, the employee claiming double compensation under Part II., section 3, of the act.

The evidence shows that the employee, Tony Revita, two other workmen and Thomas Flynn, the foreman, loaded eighteen holes with Trojan powder on the night before the injury, and that after the blast the foreman, accompanied by Mr. Walsh, of the employing firm, and three others, including the employee, inspected the blast holes. In the judgment of the said foreman there was a complete explosion in every hole. Daniel Walsh, of the employing firm, also testified that, in his opinion, every hole indicated a perfect explosion, although the tamping was not completely destroyed in every hole. It was thought, from the appearance of the hole at which the employee was injured, that the powder had been discharged. The foreman, Flynn, stated: "I did not know there was dynamite in the hole, but if I had known, I would have dug it out with water and a stick myself and would not have sent Tony to do it." The employee was put to work digging out the hole for the purpose of reloading it, and while so engaged was instructed by Mr. Walsh to stop because of possible danger. Mr. Flynn, the foreman, passed shortly afterwards and, seeing the employee disengaged, instructed him to resume the work of cleaning out the blast hole. A few moments later the explosion occurred.

The employee claimed double compensation, alleging serious and willful misconduct on the part of the subscriber through a person exercising superintendence, the foreman, Flynn. The evidence shows that there was neither serious nor willful mis-

conduct on the part of the said foreman, his act in ordering the said employee to resume the work of digging out the blast hole not being willful or deliberate, nor can it be said that the foreman had any idea of the serious consequences which resulted from the carrying out of his instructions. The blast had been carefully inspected immediately after the explosion by a party of five, including the foreman, Walsh, the part owner, and the employee, Revita, and as a result of this inspection the foreman and part owner were both satisfied that there had been a complete or perfect explosion in each of the eighteen blast holes. (*Brooker v. Warren*, 9 M.-S. 26 C. A.; *Rees v. Powell Duffryn Steam Coal Co., Lim.*, 4 M.-S. 17 C. A.; *Reeks v. Kynoch, Lim.*, 4 M.-S. 14.)

The Board finds, upon all the evidence, that the employee, Tony Revita, is not entitled to double compensation under Part II., section 3, of the act, the personal injury received by the said employee not being due to the serious and willful misconduct of the foreman, Thomas Flynn, who was intrusted with and exercised powers of superintendence at the time of said injury.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE NO. 472.

CATHERINE KERRIGAN, DEPENDENT MOTHER OF BERNARD
KERRIGAN (*Deceased*), *Employee*.

E. S. BOOTH, *Employer*.

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., *Insurer*.

COMMITTEE MAKES A DISTINCTION BETWEEN SERIOUS MIS-
CONDUCT AND SERIOUS AND WILLFUL MISCONDUCT.

The employer neglected to provide a "skid" on the right-hand side of the staging, and by reason of this neglect the employee was fatally injured.

Held, that this was not serious and willful misconduct on the part of the employer.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Catherine Kerrigan, dependent mother of Bernard Kerrigan (deceased), v. Employers' Liability Assurance Corporation, Ltd., this being case No. 472 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Edward F. McSweeney of Boston, Mass., chairman, representing the Industrial Accident Board, William F. Mackernan, Esq., of 294 Washington Street, Boston, Mass., representing the dependent mother, and Judge John G. Brackett of 89 State Street, Boston, Mass., representing the insurer, heard the parties and their witnesses in the Hearing Room of the Industrial Accident Board, Pemberton Building, Boston, Mass., on Monday, Oct. 27, 1913, at 10 A.M.

Bernard Kerrigan of 76 Everett Street, East Boston, Mass., aged twenty-two, a longshoreman, employed by E. S. Booth (insured by Employers' Liability Assurance Corporation, Ltd.), a contracting stevedore, at Clyde Steamship Pier No. 4, East Boston, Mass., on July 14, 1913, this being Monday, at 1.45 in the afternoon, was helping to land loads of sheet iron, and while steadying a load of this iron was either knocked off or fell off and was taken from the water dead.

The questions at issue are: —

1. The matter of the dependency of his mother, Catherine Kerrigan.

2. The matter of the serious and willful misconduct of the employer or his superintendent or foreman.

After a conference, counsel for both sides agreed that Catherine Kerrigan, the mother of Bernard Kerrigan, the deceased employee, was partially dependent upon his average weekly wage, as follows: —

Bernard Kerrigan was in the employ of E. S. Booth at the time of his death; his average weekly wages were \$15 a week, if that be material; his mother is Catherine Kerrigan, and she was partly dependent upon his earnings for support; he was a

young man of excellent habits and a good workman; the extent of her dependency is \$6.50 a week; that she will be entitled to \$3.25 a week, which is the proportion which the amount contributed by the employee to his mother bears to his annual earnings at the time of the injury, unless it be shown that the deceased's death was caused by the serious and willful misconduct of the employer or of a superintendent in his employ, when the amount is doubled.

On the question of serious and willful misconduct, several witnesses for the dependent mother testified in regard to the stagings, platforms and skids furnished by the employer and which were in use during the morning and afternoon of the 14th of July; also as to the manner in which Bernard Kerrigan was handling loads of sheet iron, where he stood on the vessel, and the general custom in regard to number of skids, platforms and stagings in use on different vessels where men were employed as "landers."

The evidence submitted in this case shows that during the morning hours Kerrigan was working on a staging, alongside of which was placed a skid, being largely to protect the goods being unloaded from falling into the water. At noon, the tide having changed, the stern of the ship had drifted out. In the afternoon, when Kerrigan returned to work, the foreman had taken away the skid, which in the morning had been on the left-hand side of the staging, and had not replaced it. This left the staging, approximately 5 feet wide, protected at the sides by a 4-inch plank raised from the stage about 6 inches. A bundle of sheet iron was being lowered from the ship to this stage, which struck the side of the dock, then the side of the ship, and after oscillating for a while came practically to a standstill. It did not hang directly over the center of the stage, but was a few inches off center, to the right. While this bundle of sheet iron was coming down, Kerrigan went to the end of the staging on the dock and waited until the oscillation had stopped; then he walked over to the right side of the load, put his hands against the sheet iron, which was testified to be practically stationary, and was seen to step or slip backward and fall, striking the capstan block on the dock below, thence into the water, from which his body was afterwards recovered.

There was no evidence that Kerrigan or any other workman had protested against the failure of the employer to keep a skid on the right side of the staging. The testimony of fellow workmen was that nine out of ten men doing this kind of work were right-handed, and would choose to work on the right side. In this case, it was obvious that even if the skid which had been on the left side in the morning, had been replaced it would not have protected Kerrigan against the accident. All the employees thought that safety would require that each staging should have skids alongside to protect the workmen; but the logical conclusion from this was that skids should be on both sides, because while nine out of ten workmen worked on the right side, one, at least, worked on the left.

The death certificate shows that Bernard Kerrigan died by "drowning, caused by being accidentally knocked overboard." The inquest report shows: —

I find that his death was caused by no unlawful act of any person. He was accidentally knocked from the staging leading from the ship to the wharf, upon which he was standing, into the water and drowned.

In this case the arbitrators, on the evidence of the witnesses for the dependent mother, there being no testimony introduced on this point by the employer or by the insurance company, find that reasonable care should have provided a skid on the right-hand side of the staging, to obviate the possibility of just such an accident as this, which resulted in Kerrigan's death. Neglect to provide such a skid leaves the employee open to serious consequence, as in this case, and may be considered as serious misconduct and carelessness on the part of the employer or his agent; but this does not appear to be serious and willful misconduct, as contemplated in the Workmen's Compensation Act, and the arbitrators so find.

The arbitrators find that Catherine Kerrigan was at the time of the injury partially dependent on the earnings of Bernard Kerrigan, and is entitled to \$3.25 per week for a period of three hundred weeks from the date of the injury, July 14, 1913, or \$975.

EDW. F. MCSWEENEY.

WILLIAM F. MACKERNAN.

JOHN G. BRACKETT.

CASE No. 480.

GENEVIEVE CRISTOFORO, *Employee.*

W. F. SCHRAFFT & SONS CORPORATION, *Employer.*

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., *Insurer.*

ST. VITUS' DANCE HAVING CAUSAL RELATION WITH ACCIDENT
A PERSONAL INJURY. COMPENSATION AWARDED.

The employee received a personal injury by reason of the falling of a door, and was incapacitated for work subsequently by an attack of chorea minor (St. Vitus' dance). The evidence shows that the accident was the exciting cause. *Held*, that the employee was entitled to compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Genevieve Cristoforo v. Employers' Liability Assurance Corporation, Ltd., this being case No. 480 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Joseph A. Parks, representing the Industrial Accident Board, chairman, Joseph Vesce of Revere, representing the employee, and Philip A. Hendrick of Boston, representing the insurer, heard the parties and their witnesses at the Hearing Room of the Industrial Accident Board, Pemberton Building, Boston, Mass., Wednesday, Nov. 5, 1913, at 10 A.M.

Genevieve Cristoforo, while in the employ of W. F. Schrafft & Sons Corporation, on April 3, was seated at a table with a number of others, with her back to a door of a very light construction, when the door fell, a screw in one of the roller bearings having worked loose, and struck her on the head, as a result of which she has been unable to work since. She was paid compensation up to August 14, without any question, and on August 21 Dr. William H. Ruddick, appointed by the Board as an impartial examiner, reported that she was suffering from chorea minor (St. Vitus' dance) caused by her injury;

that she was improving under medical treatment, and in his opinion would be able to return to work in about two weeks. He treated her later in his private capacity, and on September 26 reported that she had had a relapse of St. Vitus' dance and would need at least six or seven weeks more of treatment to put her into shape for work. The insurer, through its attorney, John M. Morrison, suggested that the employee be examined by another impartial physician, and the committee voted to have Dr. Francis D. Donoghue make an examination, who on November 9 submitted an opinion as follows: "This appears to be a case of chorea minor (St. Vitus' dance) which will gradually improve under treatment. The accident as described seems to be a sufficiently exciting cause in a person who is predisposed to nervous debility. While it continues the girl suffers substantial disability. Light work or work upon which her mind can be fixed would be an aid to a cure."

The committee, upon all the evidence, finds that Genevieve Cristoforo is totally incapacitated for work as a result of the injury sustained on April 13, 1913, and that she is entitled to further compensation from Sept. 4, 1913, to be continued during said incapacity, the average weekly wage being \$4.50 per week.

This decision and all findings regarding compensation or the existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III., of the Workmen's Compensation Act, and the general provisions of said act and its amendments.

JOSEPH A. PARKS.
JOSEPH C. VESCE.
PHILIP A. HENDRICK.

CASE No. 482.

TEOFILA MALEWICKI, WIDOW OF MICHAEL MALEWICKI (DECEASED), *Employee*.

B. F. STURTEVANT COMPANY, *Employer*.

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, *Insurer*.

WIDOW OF EMPLOYEE WHO VOLUNTARILY LEFT HIS OWN WORK TO ASSIST FELLOW WORKMEN ENTITLED TO COMPENSATION ON ACCOUNT OF HIS FATAL INJURY. CLAIM FOR DOUBLE COMPENSATION DISMISSED.

The employee was instructed by his foreman to block a car in the testing room about 400 feet from the scene of the fatality, but during the absence of said foreman voluntarily left his work to assist other workmen in loading a heavy heater coil on a flat car. While he was lending his aid, the wire rope which held the heater coil broke and the coil fell upon and fatally injured him. A claim for double compensation, on the ground that the injury occurred by reason of the serious and willful misconduct of the employer, was filed by the widow.

Held, that the widow of the employee was entitled to compensation. The claim for double compensation was dismissed.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Michael Malewicki (deceased) *v.* American Mutual Liability Insurance Company, this being case No. 482 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Edward F. McSweeney, chairman, William Shaw McCallum, Esq., 53 State Street, Boston, Mass., for the employee, and George P. Drury, Esq., 89 State Street, Boston, Mass., for the insurer, heard the parties and their witnesses at the Hearing Room of the Industrial Accident Board, Pemberton Building, Boston, Mass., on Monday, Nov. 3, 1913, at 2 P.M.

This being a case in which the subscriber comes under the provision of section 3, Part II., of the act, the appointment of the member of the committee of arbitration named by the association was approved in writing by the B. F. Sturtevant Company, as provided in section 5, Part III., of the act.

Michael Malewicki of Bussey Street, East Dedham, was fatally injured on Tuesday, Sept. 16, 1913, about 1.50 P.M.,

while loading an iron section of a heater coil, weighing about 2,284 pounds, on a flat car. The steel rope holding the section broke, dropping the heater coil, which fell and struck Malewicki on the head, fracturing his skull and causing death. Malewicki's average weekly wages were \$9, and the B. F. Sturtevant Company is insured in the American Mutual Liability Insurance Company.

The issues of this case are: the insurance company claims that the accident to Malewicki did not arise out of and in the course of his employment. The attorney for the widow of the deceased claimed that the accident did arise out of and in the course of Malewicki's employment, and, owing to the willful and serious misconduct of the employer, the B. F. Sturtevant Company, is subject to the double benefits provided in section 3, Part II., of the act.

The evidence in the case is substantially as follows: —

Malewicki was employed as a laborer by the B. F. Sturtevant Company, and was under the direct supervision of David Grant, who had charge of the shipping department. After the noon hour Malewicki was told by the foreman to do certain work, blocking a car in the testing room, which is about 300 or 400 feet from the place where the accident occurred. Mr. Grant, the foreman, was obliged to go to the freight yard to see about unloading cars, and when he came back he was told that an accident had occurred in another part of the room, and went there and found Malewicki lying on the ground covered with blood. The work that he had given Malewicki to perform was not completed, and he had not ordered him to help the men loading the heater coils on the freight car.

Michael Higgins, an employee of the B. F. Sturtevant Company, testified that he was controlling the brake of the hoister at the time of the accident, and saw the accident to Malewicki. Mr. Grant, the foreman, was not around. At about twenty minutes after 1, or thereabouts, Malewicki came along just as he (Higgins) and two Polish workmen were loading some coils on the car, and voluntarily offered to assist. Mr. Higgins further testified that Malewicki had raised his hand to push off the car when the rope broke, and he was struck on the head and died soon afterwards.

The fall of the section was due to the breaking of the sling

rope, which was made of $\frac{1}{2}$ -inch steel. He did not know whether this was an old or a new rope. This sling rope broke about 2 or 3 inches above the section. It was not the knot of the rope which broke, but a part of the rope halfway up.

Alex Beika testified that Malewicki had come and helped him and another Pole who was on this job, but he did not know who ordered him to come there. No particular man had charge of the work, and when Malewicki started to work foreman Grant was not there.

In answer to questions, the foreman, Mr. Grant, testified that while Malewicki had left the work, which he was not specifically instructed to do, and was helping these men loading coils on to this car, which he had not been directed to do, he considered that at the time of the accident Malewicki was in the employ of the B. F. Sturtevant Company; and if the accident had not occurred and he had found out that he was not working on the job which he wanted him to do, he would have ordered him back on the job, and would not have discharged him for leaving his work.

In view of the evidence, the arbitration committee finds that the preponderance of evidence shows that Malewicki's death was caused by an injury which arose out of and in the course of his employment, and that his widow, Teofila Malewicki, is totally dependent upon him, and is consequently entitled to an amount equal to one-half his average weekly wages of \$9 a week, or \$4.50 a week, for a period of three hundred weeks from the date of the injury.

Regarding the claim that this death is due to the serious and willful misconduct of the employer, or of any person regularly intrusted with and exercising the powers of superintendence, the arbitration committee finds that there is no evidence to substantiate the claim that Malewicki's death was due to the serious and willful misconduct of the employer or of any person regularly intrusted with and exercising the powers of superintendence, and in this case the amount of compensation is therefore not to be doubled, as provided in section 3, Part II., of the act.

EDW. F. MCSWEENEY.
WM. SHAW MCCALLUM.
GEORGE P. DRURY.

CASE No. 485.

BRIDGET O'HARE, WIDOW OF MARTIN O'HARE, *Employee*.

A. J. HOUGHTON COMPANY, *Employer*.

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., *Insurer*.

PERSONAL INJURY CAUSES HEART LESION WHICH GREW PROGRESSIVELY WORSE UNTIL DEATH RESULTED. WIDOW ENTITLED TO COMPENSATION.

The employee received a personal injury which resulted from the slipping of a beer barrel and the striking of his left side against the tail board of his wagon with sufficient force to fracture a rib. This injury brought about a lesion of the heart which grew progressively worse, no new cause intervening, until the date of his death.

Held, that the widow was entitled to compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Martin O'Hare v. Employers' Liability Assurance Corporation, Ltd., this being case No. 485 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Joseph A. Parks, representing the Industrial Accident Board, chairman, Edmond F. Ward of Roxbury, representing the widow of the deceased employee, and John G. Brackett, Esq., of Boston, representing the insurer, heard the parties and their witnesses at the Hearing Room of the Industrial Accident Board, Pemberton Building, Boston, Mass., Tuesday, Oct. 28, 1913, at 10 A.M., continuing at 3 P.M.

Martin O'Hare, the deceased employee, employed by the A. J. Houghton Company, on May 15, 1913, while in the course of his employment, was lifting a half barrel of beer from the tail board of a wagon when it slipped, and he struck his left side against the tail board with sufficient force to fracture a rib. From that time up to the day of his death, on Sept. 26,

1913, he was treated for a leaking valve of the heart, and died of acute dilatation of the heart. The insurer, through John M. Morrison, attorney, contended that his death was not the result of the injury he received on May 15, 1913.

The evidence in this case tended to show that up to the time of the injury the deceased was a healthy, robust man, had never had a doctor to the knowledge of his wife, and according to the pay roll, as submitted by the employer to show his average weekly earnings, he had worked steadily every day except on holidays. After he received the injury on May 15 he gradually lost weight, and there was a rapid progressive heart disturbance until the time of his death.

Edward P. Powers, M.D., treated the injured man from the time of the injury until his death, and testified that he saw Mr. O'Hare on the morning of the 16th of May and found he had a large discoloration on the left side of the chest; the skin was broken, and the injured man complained of intense pain every time he breathed. He could not be examined by a stethoscope owing to the pain; but three days later, in going over him, the doctor discovered a leaking valve of the heart. Mr. O'Hare complained of inability to sleep and shortness of breath. His ankles began to swell and puffed up considerably. Although he went to work on June 23 it was against the doctor's orders, and he was taking medicine for his heart continually, and complained night after night of the pain in his left side. The doctor gave as his opinion that this leaking of the heart followed the fracture of the rib, and that it was perfectly evident that the injury aggravated a condition that was not in evidence, or else produced it.

Robert B. Dixon, M.D., qualified as an expert on heart troubles, called by the insurer and having heard the testimony, gave as his opinion, among other conclusions, that the case is clear that there was a progressive going down of the heart, dating from the time of the injury, although the man improved and got better for a while, and that there is no history to go by before that time. It seems to be correct that the injury brought out something that was not apparent before. He would put it that there was some enlargement of the heart

before the accident, and that "the accident acted like a match to a fire and produced some shock, stirring up a condition which was found."

On this evidence, the committee is called upon to decide whether the acute dilatation of the heart, from which Martin O'Hare, the said employee, died, was contributed to by the personal injury received by him on May 15, 1913, and if so, whether Bridget O'Hare, his widow, was living with him at the time of said injury.

Here was a man who had never been treated by a physician before during all the years of his long married life, who worked steadily and without complaint until the day of the injury, when a rib was broken by the force of an impact with the tail board of a brewery wagon, following the slipping of a loaded half barrel of beer. He was attended by a reputable physician, Dr. Edward P. Powers, who could not make a thorough examination until three days after the injury, because the employee suffered intense pain. At the time of the examination he found a leaking valve in the heart which, in his opinion, was caused by the injury. O'Hare complained of inability to sleep, shortness of breath and his ankles became swollen. From the very beginning, after giving necessary surgical attention to the broken rib, the physician treated him with the idea in view of relieving his heart trouble. When the employee returned to work five weeks after the injury, he was still suffering from the heart lesion. There was a gradual loss in his weight, accompanied by progressive heart disturbance, culminating in death. The expert on diseases of the heart, introduced by the insurer, testified that there was a progressive going down of the heart, dating from the injury; that, in his opinion, there was some enlargement of the heart before said injury occurred, but that the injury, acting much like the application of a lighted match to tinder, stirred up what may possibly have been a dormant condition, and death followed.

The chain of causation is complete; the employee had always been in good health until the injury occurred; the heart lesion followed as the result of the injury, and death from acute dilatation of the heart subsequently supervened. (*Dunham v.*

Clare, 4 M-S, 102 C. A.; Thoburn v. Bedlington Coal Co., Ltd., 5 B. W. C. C. 128 C. A.; Trodden v. J. McLennard & Sons, Ltd., 4 B. W. C. C. 190 C. A.)

The committee of arbitration finds that Martin O'Hare, the said employee, received a personal injury arising out of and in the course of his employment on May 15, 1913, said personal injury being a material contributing cause of his death on Sept. 26, 1913; that Bridget O'Hare, his widow, living with him at the time of the injury, is conclusively presumed to be wholly dependent upon the said employee for support; that his average weekly wages were \$18.30; and that there is due the said Bridget O'Hare, widow of the said employee, a weekly payment of \$9.15 for a period of two hundred and ninety-six and three-sevenths weeks from Sept. 26, 1913, — the employee having received compensation for a period of three and four-sevenths weeks from the incapacity for work and consequent loss of wages prior to June 23, 1913, upon which latter date he returned to work, — amounting to \$2,712.32.

JOSEPH A. PARKS.

EDMOND F. WARD.

JOHN G. BRACKETT.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties and their witnesses at the Hearing Room, Pemberton Building, Boston, Mass., Thursday, Dec. 18, 1913, at 2.45 P.M., and affirms and adopts the findings of the committee of arbitration.

The evidence before the committee of arbitration showed that prior to the date of the injury the deceased was a healthy, robust man, had never had a physician so far as his wife knew, and had worked steadily every day for his employer, except on holidays. After he received the injury on May 15, 1913, he gradually lost weight, and there was a rapid progressive heart disturbance until the time of his death.

Edward P. Powers, M.D., treated the injured employee from the date of the injury until he died, and testified that he

saw him on the morning of May 16, 1913, and found that he had a large discoloration on the left side of the chest, the skin being broken and the employee complaining of intense pain every time he breathed. He could not manipulate about the seat of the injury until May 18 because of the pain from which the employee suffered. On the latter date, however, the broken rib was discovered. He strapped the chest to keep the fragments of the rib in position, and left a soothing dressing, tablets having already been prescribed to relieve the pain caused by the injury. On May 19 he first examined him with a stethoscope, and then discovered a leaking valve of the heart. The employee complained of inability to sleep and shortness of breath. His ankles began to swell and puffed up considerably. Although he resumed work on June 23, 1913, it was against the advice of the physician, who stated that while he did not see him professionally from June 23 to September 17, during all that time he was under medication by him. He had been given digitalis for the heart lesion and the doctor stated: "I know positively that he carried a bottle of this around with him. I have seen him with it in his pocket. He was taking 10 to 15 drops three times a day. That quieted the heart and removed the fluid, — the edema." The physician was not experienced in treating cases where heart trouble was caused by a broken rib, and this was the only case he had personally treated. The employee was the type of man who, if he had the trouble before the accident, would not have had a physician for it unless it gave him particular trouble. In heart conditions, so far as the doctor could say, there were thousands of men going around to-day doing heavy manual labor with probably worse hearts than the employee had. The employee had an attack of acute indigestion on Sept. 17, 1913, which was cured on Sept. 19, 1913. The heart lesion had at that time become chronic. "A heart lesion is irreparable. You can repair a broken valve. Speaking of the acute indigestion, at that time there were no symptoms referable to the heart. I treated him for indigestion." He still had the heart trouble and his heart was still leaking. He stated that the indigestion might have aggravated the chronic condition of the heart due to the injury. Answering the questions of

counsel for the insurer: "That was the aggravation that brought about the downfall?" he said: "It might have been contributory." "Acute indigestion would accelerate the condition of a chronic diseased heart?" "Sometimes, yes. I did not notice this acceleration." "Did this indigestion have any effect upon the heart?" "I did not notice it." The physician expressed the opinion that this leaking of the heart followed the fracture of the rib, and that it was perfectly evident that the injury aggravated a condition that was not in evidence, or else produced it. He signed the death certificate and stated that the immediate cause of death was acute dilatation of the heart, mitral insufficiency as contributory, and fracture of the rib.

Frank H. Neuberger, a shipper for the employing firm, stated that O'Hare appeared to have grown somewhat lighter upon his return to work June 23, 1913, and that he did not look so robust as before the injury.

The attorney for the insurer asked the following question: —

During all this time, from June 23 up to September 17, did he ever complain to you of feeling unwell?

Mr. Neuberger replied: The only time Mr. O'Hare made any remarks at all was when he reported to me. In the way of fellowship, I said, "Martin, how are you feeling?" He said: "I could feel better."

Mr. Neuberger further testified that the only time he saw him was when he brought the team into the plant. He had no knowledge as to the work performed by him, nor could he say whether the man with him lightened the burden or not. There were two men on the team. A side partner might shoulder the big bulk of the work. As a rule, they try to work together.

Is it not possible that, this man having met with an injury, the other fellow might have been likely to help him out?

Would that not be man fashion? I have been on teams myself, and I know just how they work. The striker might say to the teamster, "Sit down in the seat and I will do the work!"

Is it possible that might have happened?

Yes.

Robert B. Dixon, M.D., called by the insurer as an expert, and who had no personal knowledge of the case, stated that, in

his opinion, a fracture of the rib would not cause dilatation of the heart. The rib, from all the evidence, healed and got well in about four or five weeks. The doctor stated that there was no question as to the employee having died from heart disease. He could have had a condition of enlargement of the heart prior to the injury, that is, hypertrophy, without getting any particular symptoms from it. Many go along with hypertrophied hearts until they get a heavy strain, then they begin to get some symptoms. The question is whether the broken rib acted as an exciting cause for heart trouble already existing, although it had not shown marked symptoms of heart trouble. I am unable to say whether it did or did not. It might temporarily have keyed up the heart action if there was enough shock from the trouble; whatever shock there was he got better of it and got around again. The future symptoms in that case were those of a diseased heart, swelling feet, shortness of breath, some pain, particularly shortness of breath on exertion. The case is clear that there was a progressive going down of the heart, dating from the time of the injury, although the employee improved and got better for a while, and that there is no history before that time. It seems to be correct that the injury brought out something that was not apparent before. The doctor finally expressed the opinion that there was some enlargement of the heart before the accident, and that "the accident acted like a match to a fire and produced some shock, stirring up a condition which was found."

Mrs. O'Hare testified as to the injury and to his treatment, stating that he took the medicine that the doctor prescribed during the time between the date of his return to work and his death, and that he was suffering all the time. Prior to the injury he had been a well man, never having had a doctor to her knowledge. After the injury, continuing during the time he resumed his employment, he complained continually of a pain in his heart and suffered constantly.

The Industrial Accident Board finds that the personal injury received by the employee, the said Martin O'Hare, on May 15, 1913, brought about a lesion of the heart which grew progressively worse, there being no new cause intervening, until the date of his death on Sept. 26, 1913. Notwithstanding the

fact that the employee returned to his employment for a time, the heart disease continued to progress, the attack of indigestion from which the employee suffered having been wholly cured, and not breaking the chain of causation between the said injury, the heart lesion, and the subsequent death of the employee. The old cause, to wit, the progressive heart disease, continued, and death was the natural consequence of said progressive heart disease, a definite connection being established between the personal injury received on May 15, 1913, and the death of the said employee on Sept. 26, 1913. (*Golder v. Caledonian Railway Co.*, 40 Sc. L. R. 89; *Thomson v. Mutter, Howey & Co.*, 107 L. T. 339, 6 B. W. C. C.)

The Board finds that there is due Bridget O'Hare, the widow of the said Martin O'Hare, a weekly payment of \$9.15 for a period of two hundred and ninety-six and three-sevenths weeks from Sept. 26, 1913, from the insurer, the Employers' Liability Assurance Corporation, Limited, the said employee having received from said insurer three and four-sevenths weeks' compensation on account of total incapacity for work, there being due the said widow the sum of \$2,712.32 in weekly payments during said period of two hundred and ninety-six and three-sevenths weeks.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 486.

CATHERINE ST. JOHN, *Employee*.
F. H. ROBERTS COMPANY, *Employer*.
TRAVELERS INSURANCE COMPANY, *Insurer*.

EMPLOYEE OPERATING A MACHINE FOR PURPOSES OF HER OWN NOT ENTITLED TO COMPENSATION.

The employee, whose usual occupation was that of turning down laces in boxes, received an injury while operating a box-lacing machine, for purposes of her own, during the noon hour.

Held, that she was not entitled to compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Margaret St. John, mother of Catherine St. John, v. F. H. Roberts Company, this being case No. 486 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of James B. Carroll, representing the Industrial Accident Board, Linley M. Paul, representing the employee, and William C. Prout, representing the insurer, heard the parties and their witnesses at the Hearing Room, Pemberton Building, Boston, Mass., Friday, Nov. 21, 1913, at 10 A.M.

Plaintiff, the employee, appeared without counsel, and the insurer was represented by L. C. Doyle, Esq.

The testimony was substantially as follows: —

Catherine St. John, the injured, whose address is 1 Saratoga Street, East Boston, testified: —

While working for the F. H. Roberts Company I was injured on Sept. 4, 1913. In the noon hour I tried this machine, and while turning it felt kind of nervous and my finger went in the machine. I was laid up for about six weeks. Dr. Cody attended me about five weeks. I received \$4 a week for my regular work. I was not quite fifteen years old, my birthday being the 2d of October. I saw the girls turn the machine and I had tried it several times before. I am going to school now, but did not attend school at the time of the accident. Miss Agnes O'Brien, the forelady, put me to work turning down the laces of the boxes. She never told me not to touch the machines, just told me to go to work. When she found me away from my work, would tell me to go back again. Miss O'Brien never saw me using the machine. I had made quite a few boxes on the machine. Nobody told me to keep away from it, but this day as I was using it Ethel Bennett told me not to use the machine, and I told her to "keep still." I thought that by running the machine during my leisure moments I could advance myself, as that was the way some of the other girls had learned to make boxes. My sister had learned to run a machine in this way.

Katherine Seaman testified: —

I have worked four years and operated a lacing machine. I was there when she went on the machine, but was not present when she got hurt. I received orders not to touch the machine, but do not know about any-

body else receiving them. I did not start running a machine at first, but was broken in. I was instructed before I went on the machine.

Ethel Bennett testified that she lived at 98 Jacques Street, Somerville: —

I was working on the "gluing-off" machine and saw Miss St. John get hurt. I told her not to run the machine, but she told me "to keep quiet." We have received orders not to work on this machine. I heard the girl for whom Miss St. John worked tell her not to touch the machine.

Miss Agnes O'Brien, forelady in the box-making department of the F. H. Roberts Company, testified that Catherine St. John was hired as a floor girl, and that turning down laces was her regular work: —

When I found her doing other work I always sent her back to her own. I paid her at the regular rate of \$4 per week. I never saw her at a machine at all. I expected her to do so much, because when she got behind in her work it kept back the girl whom she helped. I was not in the room at the time of the accident. Had stepped out to the office, and when I came back found that she had gone to the hospital. She did not want to see me. I go out to the office quite frequently, but there is a man in charge of the machines, and he was at the carpenter's bench repairing when the accident happened.

On this evidence we find that Catherine St. John at the time she met with her injury was working in a place where she was not directed to be, and at an employment she was not hired to do; that she was not asked or invited to work upon the machine whereon she was injured, and it was not known to the employer or any person acting with authority for said employer that she was so engaged. We therefore find that the injury to the employee did not arise out of and in the course of her employment, and that she is not entitled to compensation under the Workmen's Compensation Act.

JAMES B. CARROLL.
WILLIAM C. PROUT.
LINLEY M. PAUL.

CASE No. 487.

NORA NICKERSON, DEPENDENT OF LESTER W. NICKERSON
(DECEASED), *Employee*.

BOSTON WOVEN HOSE AND RUBBER COMPANY, *Employer*.

NEW ENGLAND CASUALTY COMPANY, *Insurer*.

PERSONAL INJURY RESULTS FROM MINOR TRANSGRESSION
AND NOT BY REASON OF EMPLOYEE'S SERIOUS AND WILL-
FUL MISCONDUCT. WIDOW AWARDED COMPENSATION.

The employee was engaged to do general cleaning, painting and whitewashing, and some of his work had to be done near machinery and shafting which, when in motion, would involve danger. He had been directed to do this work during the noon hours when the machinery was stopped. On the day of the injury the superintendent had said to the employee that the work on a wall near the moving shafting should be done at noon, when the machinery was stopped. This was about 11.30 A.M. The employee went to work at this place about five minutes later, expecting to finish the job when the machinery was stopped. His clothing was caught by a projection from the collar on the shafting, his body was drawn around the shafting, and he received injuries which caused his death. The insurer refused to pay compensation, alleging serious and willful misconduct on the part of the employee in failing to obey the instructions of the superintendent.

Held, that the widow was entitled to compensation, the injury not having occurred by reason of the employee's serious and willful misconduct.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to Supreme Judicial Court.

Decision. — The Supreme Judicial Court affirms the decision of the Industrial Accident Board.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Nora Nickerson, dependent of Lester Nickerson, deceased employee, v. New England Casualty Company, this being case No. 487 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of David T. Dickinson, chairman, William J. Drew for the employee, and Benjamin A. Lockhart, Esq., for the insurer, heard the parties and their witnesses at the Town Hall, Plymouth, Wednesday, Nov. 19, 1913, at 10 A.M., and reports as follows: —

The committee finds that the above employee on Aug. 1, 1912, received an injury arising out of and in the course of his employment, which caused his death on the same day. At the time of his injury his average weekly wages were \$13. For a period of about two weeks before the date of the injury the plant of said rubber company at Chiltonville had been undergoing general cleaning, including interior painting and whitewashing. The general manager had told a superintendent at the beginning of this period to direct the men not to do cleaning work near the dangerous machinery or shafting while in motion, and to have the work done in such dangerous places during the noon hours, when the machinery was stopped. The superintendent told said employee of this order in general terms two or three times before the date of the injury, and the employee had twice assisted in said work of cleaning during different noon hours when the machinery was stopped.

On the date of the injury, at about 11.30 A.M., the superintendent saw the employee whitewashing in the devulcanizing room. The employee was then standing in a so-called drain-bin, and his staging or platform used in whitewashing walls was then alongside of the end wall of said room, opposite and farthest away from a shafting carrying several pulley wheels. The shafting ran parallel to and about 18 inches from the adjacent wall, and was at this time in motion. The employee, after asking the time of day, said to the superintendent, pointing towards the wall in the direction of the moving shafting, "What shall I do up there?" The superintendent said, "We will do that during the noon hour, after the machinery is stopped." He also told the employee that it was about 11.30, that he would find out the correct time and report it to him. He left the room for this purpose, but other duties prevented his immediately attending to it. About ten minutes later, or some few minutes before the noon hour, the superintendent was attracted by a noise in the devulcanizing room. He immediately caused the machinery to be stopped, and went into said room, and saw the employee lying on the staging which had then been placed alongside of the wall below said shafting, with a space of about 18 inches between said staging and the wall. This staging was a ladder and a plank placed across a section

of the top of the drain-bin. Some fresh whitewashing had just been done on this adjacent wall, in area about 3 feet wide, which would have taken about five minutes to do. The shafting was at an elevation of about 3 feet above the staging, and the area freshly whitewashed was on a level above the line of the shafting. The employee had been stripped of his entire clothing except his shoes and stockings, and said clothing was wound tightly around the shafting, at a place where there was a metal collar with two flanges projecting up from its ends and a screw head also sticking up from the collar between the flanges. There was also a nick broken out from the edge of the collar, apparently before the accident. A loose jumper worn by the employee was the first article of clothing wound around the surface of the collar, the other articles being over this jumper. The employee was a man weighing about 180 pounds.

The committee finds, considering the employee's size and the location of the freshly whitewashed area, that he had probably done this work while standing on the platform, on the side away from the shafting, — that is, not in the space between the shafting and the wall, — and thus his jumper was caught by the projections on said collar as he stooped under the shafting in connection with using the pail; that his body was carried around the shafting and struck against the staging-platform, and received the injuries which caused his death.

The committee finds that he removed the staging to this position after the superintendent had left him at 11.30, and had been about five minutes working at whitewashing before the accident, expecting every minute that the shafting and machinery would be stopped at the noon hour, when he would continue the work, with the machinery and shafting then at rest.

It was contended by the insurer that the injury did not arise out of and in the course of his employment, and that it was caused by reason of the employee's serious and willful misconduct. The committee cannot, after hearing all the evidence and testimony, agree with this contention. It appears that it arose out of and in the course of his employment, being within scope. The shafting and machinery were about to stop at any

moment, in the mind of this employee, when he could continue to work with absolute safety. His decision to do some whitewashing in this very brief interval seems more like a sudden thought than a willful act. It seems that it should fairly be regarded as a minor transgression at most, from his standpoint, and not as serious and willful misconduct.

The committee therefore finds that the claimant, who is his widow, and who was living with him at the time of the injury, was wholly dependent upon him at the time of the injury, and that she is entitled to a weekly compensation of \$6.50 for a period of three hundred weeks from Aug. 1, 1912, the date of the injury.

DAVID T. DICKINSON.

BENJAMIN D. LOCKHART.

WM. J. DREW.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, New Albion Building, Boston, Mass., on Friday, Jan. 9, 1914, at 2.15 P.M., and affirms and adopts the findings of the committee of arbitration.

JAMES B. CARROLL.

DUDLEY M. HOLMAN.

DAVID T. DICKINSON.

EDW. F. MCSWEENEY.

JOSEPH A. PARKS.

Decree of Supreme Judicial Court on Appeal.

SHELDON, J. The insurer contends that this injury happened by reason of the employee's "serious and willful misconduct," and so that no compensation can be awarded therefor (St. 1911, c. 751, Part II., § 2). He was employed to do general cleaning, painting and whitewashing. Some of his work had to be done near machinery and shafting which, when in motion, would involve danger; and he had been directed to do this work during the noon hours when the machinery was stopped. At about half-past 11 o'clock on the forenoon of the

day on which he was injured, the superintendent, in answer to a question from him about work on a wall near the moving shafting, said to him, "We will do that during the noon hour when the machinery is stopped," and told him also that it was about half-past 11, and that he (the superintendent) would find out the correct time and report it to him. The employee went to work at this place about five minutes later, expecting that the machinery would be stopped at noon, when he would continue the work with the machinery at rest. His clothing was caught by a projection on the collar of the shafting, his body was drawn around the shafting, and he received injuries which caused his death.

"Serious and willful misconduct" is a very different thing from negligence, or even from gross negligence. (*Burns' Case, ante*; *Johnson v. Marshall Sons Co.* (1906), A. C. 409.) It resembles closely the wanton or reckless misconduct which will render one liable to a trespasser or a bare licensee. (See *Romana v. Boston Elevated Railway*, Mass. 218, and the cases cited on p. 76.) Its existence under any particular circumstances is usually a question of fact. (*Leishman v. Dixon*, 3 B. W. C. C. 560; *George v. Glasgow Coal Co.* (1909), A. C. 123; *Bist v. London & Southwestern Railway*, 96 L. T. 750.)

Here the Industrial Accident Board has found, in accordance with the report of the arbitration committee, that this was not "serious and willful misconduct;" that "the shafting and machinery were about to stop at any moment in the mind of this employee, when he could continue to work with absolute safety. His decision to do some whitewashing in this very brief interval seems more like a sudden thought than a willful act. It seems that it should fairly be regarded as a minor transgression, at most, from his standpoint, and not as 'serious and willful misconduct.' "

Unless this finding is shown to be unwarranted, upon the evidence, it now is conclusive. (*Donovan's Case*, 217 Mass. 76; *Bentley's Case*, 217 Mass. 79; *Diaz's Case*, 217 Mass. 36.) We cannot say that it was unwarranted. The fact that the injury was occasioned by the employee's disobedience to an order is not decisive against him. To have that effect, the disobedience must have been willful, or, as was said by Lord

Loreburn, in *Johnson v. Marshall, Sons & Co., Ltd.* (1906), A. C. 409, 411, "deliberate, not merely a thoughtless act on the spur of the moment."

This case comes well within the rule of the decisions which have been cited. The decree of the Superior Court must be affirmed.

So ordered.

CASE No. 490.

PAUL MIKONIS, *Employee.*

N. D. CASS COMPANY, *Employer.*

ROYAL INDEMNITY COMPANY, *Insurer.*

EMPLOYEE WHO RECEIVES PERSONAL INJURY BY REASON OF IMPERFECT OPERATING CONDITIONS NOT ENTITLED TO DOUBLE COMPENSATION.

The employee claimed that he received a personal injury by reason of the condition of the saw which he was using, said condition being due, he alleged, to the serious and willful misconduct of his employer. Two fellow employees testified, however, that the injury was caused because the claimant reached over the saw to remove a stick which had become wedged, and cut his thumb thereby. He could have shut off the power and removed the obstruction without danger of injury.

Held, that the employee was not entitled to double compensation, the injury not having been caused by reason of the serious and willful misconduct of his employer.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Paul Mikonis v. Royal Indemnity Company, this being case No. 490 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of Dudley M. Holman, chairman, representing the Industrial Accident Board, Judge Elisha S. Hall, representing the insurer, and Anthony Moshure, representing the employee, heard the parties and their witnesses at the Selectmen's Room, Town Hall, Athol, Mass., on Friday, Nov. 21, 1913, at 12.45 p.m.

The appearances were as follows: Henry S. Ames, Esq., for the employee, Robert E. Beecher, Esq., for the employer, and Mr. Stetson for the insurer.

It appeared in evidence that Paul Mikonis, while working in the wood department of the N. D. Cass Company, toy and paper box manufacturers at Athol, Mass., was injured on Wednesday, July 23, 1913, at 4 o'clock in the afternoon while operating a rip saw. It was agreed that his average weekly wages were \$9. The accident resulted in severing his right thumb at the first joint, causing the loss of one phalanx of his thumb.

It was agreed by counsel that he was unable to work for a period of five weeks. He was entitled to specific compensation at the rate of \$4.50 a week for a period of twelve weeks for the loss of the phalanx, and to \$4.50 a week for three weeks beginning with the fifteenth day after the accident.

The employee, through his attorney, raised the question of serious and willful misconduct on the part of the employer or his agents or superintendents, as there was no guard on the saw. The arbitration committee visited the premises where the accident occurred, to examine into the working conditions there. Mikonis claimed that he was given poor saws to work with, dull and liable to cause injury, and that he frequently had protested against working with such saws. A fellow employee, Stanley Snrski, testified that he himself had refused to work with dull saws, fearing injury, and that he always secured a sharp saw upon making a complaint, as he refused to work with a dull saw.

It appeared in evidence that the firm employed a man whose chief duty was to set and sharpen saws, and this was done largely by mechanical appliances which are in general use in such places; that the saws such as Mikonis used were sharpened ordinarily two or three times a day, and that when he needed a sharper saw he had simply to go to the filer and get a sharpened saw, and this he frequently did. He claimed that when he asked the "boss" for a different saw to work with he was frequently sworn at and told that he could either work with the tools which were provided or he could get out; that there were several machines using saws that were similar to the one used by Mikonis, and that when a workman took a saw from his machine into the sharpening room he was given a sharpened saw, and that the saw which he took back was

just as likely to be given to some other man as it was to come back to him. In other words, the saws rotated between the different employees who were using such saws. No evidence was introduced to show that the saws which were used were of an inferior make or grade, but it did appear in evidence that the saws were of a high grade, such as would be commonly used in an establishment of this sort.

Mikonis claimed that his injury was received because, the saw being dull, the wood jumped and his hand was thrown against the saw, severing his right thumb at the first joint. Two of his fellow employees testified that they were standing near him and were looking at him at the time of the accident; that their vision was unobstructed by anything, and that he really received the accident by reaching over the saw to remove a stick of wood which had become wedged, and cut his thumb against the saw in this manner. He could have shut off his power and have removed the obstruction without any danger to himself. There were conditions, however, under which this man was operating that might have been so perfected by the installation of safety devices as to have prevented this accident; but there was no testimony introduced sufficient in weight to allow his contention that the accident arose out of the serious and willful misconduct of his employer or his agents or superintendents.

We find, therefore, that Paul Mikonis received an injury arising out of and in the course of his employment on July 23, 1913, which resulted in the loss by severance of his right thumb at the first joint, and that he is entitled to recover specific compensation for the loss of a phalanx for twelve weeks of one-half his average weekly wages, \$4.50, and that he is entitled, further, to free medical and surgical attendance during the first fourteen days after the accident and to compensation for three weeks beginning with the fifteenth day after the accident, and that he is not entitled to recover double compensation.

DUDLEY M. HOLMAN.
ELISHA S. HALL.

CASE No. 492.

PATRICK O'CONNOR, *Employee*.

A. BRACKETT & SON, *Employer*.

LONDON GUARANTEE AND ACCIDENT COMPANY, LTD., *Insurer*.

EMPLOYEE WHO RECEIVED A PERSONAL INJURY BY REASON
OF AN ASSAULT BY AN IRATE CUSTOMER ENTITLED TO
COMPENSATION.

The employee had been instructed to decline to supply a certain customer with merchandise until he had paid a bill that was long overdue. This customer, having paid his bill, and received the goods ordered, had occasion to pass the employee. The former was in an angry mood, because of the latter's refusal to serve him in the first instance, and he called the employee a name and struck at him as he passed. The employee parried the blow and the customer laid hands on him, the employee meanwhile resisting, with the result that the latter received the personal injury which caused him to be totally incapacitated for work. The committee came to the conclusion that the employee was subjected to a risk in the proper carrying out of his employer's orders through no contributory action or remark of his own.

Held, that the employee was entitled to compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings and decision of the committee of arbitration. (Mr. Dickinson dissents.)

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Patrick O'Connor v. London Guarantee and Accident Company, Ltd., this being case No. 492 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Edward F. McSweeney of the Industrial Accident Board, chairman, N. P. Sippelle, Esq., of 6 Beacon Street, Boston, Mass., representing the insurer, and Thomas H. Mahoney, Esq., of 15 Beacon Street, Boston, Mass., representing the employee, heard the parties and their witnesses in the Aldermanic Chamber of the City Hall, West Newton, Mass., Dec. 12, 1913, at 10 A.M.

Patrick O'Connor, whose average weekly wage was \$14, was employed by A. Brackett & Son, who are insured by the

London Guarantee and Accident Company, Ltd., and on Aug. 19, 1913, he was injured by breaking the fibula of his right leg, causing incapacity for work for a period of six weeks.

It appears from the testimony that O'Connor's employers are dealers in hay, grain, coal, wood, etc. One day early in the week preceding the said nineteenth day of August, 1913, the date of the injury, a customer by the name of Lacey bought three bushels of oats for which he did not pay. O'Connor was instructed by his employer not to deliver any more oats to Lacey on credit until he paid for the three bushels for which he already owed.

It appears that after this order was given to O'Connor Lacey came into the office and paid for the oats which he had bought, but no notification of his having done so was given to O'Connor.

Early in the morning of Aug. 19, 1913, before the bookkeeper or the head of the firm came to the store, Lacey came in and asked O'Connor to sell him two bushels of oats. O'Connor told him that he could not have any more oats until Lacey paid for what he already had. There were no witnesses to this meeting, and there was a divergence of testimony between Lacey and O'Connor as to exactly what O'Connor said to Lacey.

Lacey told O'Connor that he was going to pay cash for the oats he ordered, whereupon O'Connor took \$1.25, given him for this purpose, and went to the bookkeeper's desk to write the receipt therefor and to make change. At this time the bookkeeper, Miss Graham, came in, and O'Connor left the office to allow her to conclude the transaction, while he went for the two bushels of oats, and put the same in Lacey's team, which was standing in the yard.

From the testimony of Lacey and O'Connor it appears that prior to this time there had been no cause for ill feeling, and that none had existed between them. Lacey admitted in his testimony that he was exceedingly vexed and angry at O'Connor because when he came in and asked for the oats he said O'Connor accused him of having stolen some oats the previous week.

According to O'Connor's testimony, when Lacey came from

the office, after concluding the transaction with Miss Graham, O'Connor was in a narrow passageway engaged in the act of connecting an electric wire to a fixture.

Lacey's testimony was that O'Connor was standing in the middle of said passageway to the yard, and that he had brushed O'Connor as he passed by.

O'Connor testified that Lacey had called him a name and struck at him, and that he parried by putting up his arm, and that Lacey had grabbed hold of him, and that he resisted and in the struggle which followed both fell out of the doorway upon a pile of loose slabs of wood with Lacey underneath.

O'Connor further testified that as they were on the ground he exclaimed that he would have the law on Lacey for the assault.

When he got up he looked around to see whether there were any witnesses to the assault in sight, and that thereupon Lacey had jumped at him, grabbing him by the neck, and that as he did so he, O'Connor, stepped on a piece of loose slab which gave way, and he felt his leg snap, and cried out that his leg was broken. Lacey then got into his wagon and drove away. Lacey said he did not believe O'Connor's leg was broken.

The arbitrators find from the evidence that O'Connor, while in the pursuit of his occupation, and while fulfilling the orders of his employer, informed Lacey that his employer could no longer give him credit. The fact that Lacey had in the meanwhile paid A. Brackett & Son, the employers in question, the bill which he owed them, and which was the cause of the trouble, was not known to O'Connor. This statement by O'Connor, however made, vexed Lacey, who, when he went out after paying for the two bushels of oats bought on August 19, according to his testimony, brushed by O'Connor in the passageway, and that this was the beginning of the occurrence which afterwards resulted in the fracture of O'Connor's leg. Both parties agreed that prior to Aug. 19, 1913, no ill feeling existed between them, and that as both fell to the ground, O'Connor exclaimed that he would have the law on Lacey, and that Lacey thereafter got into his wagon and drove away;

also that O'Connor was subsequently employed by A. Brackett & Son. All these facts, when considered in relation to this case, confirm the belief that Lacey was the aggressor.

The arbitrators find, therefore, as a fact, that Patrick O'Connor received an injury by having the fibula of the right leg broken, which injury incapacitated him for labor for six weeks. In consequence thereof O'Connor is entitled to his reasonable medical and hospital services for the first two weeks after the injury, and to four weeks' incapacity compensation at one-half his average weekly wage of \$14, making a total due him from the London Guarantee and Accident Company, Ltd., in addition to his medical and hospital services for two weeks, of \$28 for disability compensation.

EDW. F. MCSWEENEY.

THOMAS H. MAHONEY.

N. P. Sipprelle dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, New Albion Building, Boston, Mass., Thursday, Jan. 15, 1914, at 3 P.M., and affirms and adopts the findings of the committee of arbitration.

The facts are substantially set forth in the report of the committee of arbitration, the Board finding, upon the evidence introduced before said committee, that the employee received a personal injury arising out of and in the course of his employment. It was the duty of the employee, the said Patrick O'Connor, to serve customers who called at the place of business of his employer; and in the course of his employment, in accordance with orders from the office, it became the duty of the said employee to refuse to furnish grain or other materials to customers whose bills remained unpaid. In the case under consideration O'Connor had been instructed to decline to supply Lacey with oats until he had paid his bill at the office. Lacey thereupon tendered O'Connor payment for the oats ordered,

and after depositing the money in the office the latter deposited the oats in Lacey's wagon. The latter, who was in an angry mood, because of O'Connor's refusal to serve him in the first instance, had occasion to pass the employee, and called him a name and struck at him as he passed. O'Connor parried the blow, and Lacey laid hands on him, the employee resisting, with the result that O'Connor received the personal injury which caused him to be totally incapacitated for work for a period of six weeks.

There is no question as to this injury arising "in the course of" the employment, since it occurred while the workman was doing the duty which he was employed to perform. It arose "out of" the employment, because there was a causal connection between the refusal of the employee to deliver merchandise to a customer, in accordance with the orders of the employer, and the assault which followed; between the conditions under which the employer required the said employee to work and the resulting injury. If it had not been for the employee's obedience to the orders of his employer, the customer would not have lost his temper and assaulted the employee, the personal injury following as a natural incident of the work, and one which might reasonably be contemplated as a result of the exposure occasioned by the nature of the employment, particularly in view of the fact that said employment contemplated the refusal by the employee to serve certain customers who were in arrears in the payment of their accounts.

The risk of an assault by an irate customer, to whom credit had been refused, may reasonably be looked upon as incidental to the employment of the employee, who claims compensation in this case. This is not a case where the injury was not due to the nature of the employment, nor is it a case where the employee, by reason of his own conduct, exposes himself to injury. It was a peril involved in his contract of service with the employer. *Challis v. London & South Western Ry. Co.*, 7 W. C. C. 23; *Nisbet v. Rayne and Burn*, 3 B. W. C. C. 507.

Cozens-Hardy, M. R., in *Craske v. Wigan*, 2 B. W. C. C., says that it must be shown that "the accident arose because of something I was doing in the course of my employment,

or because I was exposed, by the nature of my employment, to some peculiar danger."

The committee of arbitration had an opportunity to observe the employee, O'Connor, and the customer, Lacey, and came to the conclusion that the said employee was subjected to a risk in the proper carrying out of his employer's orders through no contributory action or remark of his own, which brought the injury within the scope of the statute.

The Board finds, therefore, that the said employee, Patrick O'Connor, received a personal injury arising out of and in the course of his employment, on Aug. 19, 1913, and was totally incapacitated for work by reason of said injury for a period of six weeks; that his average weekly wages were \$14; that there is due him a reasonable allowance for medical services during the first two weeks after the injury, and the sum of \$28 in full for all incapacity for work on account of said personal injury.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

I respectfully dissent from this decision on the ground that the injury did not arise out of the employment.

DAVID T. DICKINSON.

CASE No. 493.

MRS. ADA PARKER, WIDOW OF ALBERT PARKER, *Employee*.
TAUNTON-NEW BEDFORD COPPER COMPANY, *Employer*.
AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, *Insurer*.

FATAL INJURY ARISES OUT OF AND IN THE COURSE OF THE
EMPLOYMENT. DEPENDENT WIDOW ENTITLED TO COM-
PENSATION.

A question was raised as to whether the fatal injury occurred by reason of the lighting of a cigarette by the employee and the ignition of his clothing, or by reason of the use of a lantern or light. The weight of the evidence showed that the clothing of the employee was saturated with oil, and that everywhere he ran after the accident oil dripped and pieces of clothing fell, following

the flames from the oil drippings. The probable and reasonable cause of the presence of oil in such excess quantity was traced to the lantern, according to the testimony of several witnesses.

Held, that the injury arose out of and in the course of the employment, and that the widow was entitled to compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Ada Parker, widow of Albert Parker, *v.* American Mutual Liability Insurance Company, this being case No. 493 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of Joseph A. Parks of the Industrial Accident Board, chairman, William Acton of Fall River, Mass., representing the widow, and Thomas A. Tripp of New Bedford, representing the insurer, heard the parties and their witnesses in the Aldermanic Chamber, City Hall, New Bedford, Mass, on Friday, Nov. 21, 1913, at 11 A.M.

Charles R. Cummings, Esq., and Orton Peck, Esq., appeared for the widow and the insurer, respectively.

The insurer questioned whether the injury which caused the death of Albert Parker, the employee, arose out of and in the course of his employment, and the average weekly wages were also in dispute. The said employee received burns while at work in the shop of the Taunton-New Bedford Copper Company, and a question was raised whether a lamp, used in connection with his employment or a cigarette, caused the injury which resulted fatally.

Mrs. Ada Parker, widow of the said employee, testified that she married him on Jan. 8, 1913, and that he died on Sept. 17, 1913. She was called to St. Luke's Hospital, where her husband had been taken, immediately after the injury was received, at about 1 o'clock on the morning of September 17, and remained there four or five hours, death occurring at about 6 o'clock. Her husband was conscious all the time, and in answer to her request for an explanation of the accident he had informed her that it was through no fault of his; a lamp had caused it, and he had thrown it from him, as it was all ablaze. He said it seemed to blaze up into his face, and told her that the lamp would be found in the shop. Mrs. Mary

Bailey accompanied her and heard part of the conversation. Her husband earned an average weekly wage of between \$11 and \$12.

Mrs. Mary Bailey testified that she went to the hospital with Mrs. Parker, and that, while she did not hear all of the conversation between husband and wife, heard him say it was a lamp which had caused the injury to him.

Robert Disbury testified that he arrived at the hospital at about 5 o'clock, remaining with Parker until he died. Parker stated that he knew he was going to die, and that he would like to speak to him alone. The dying man and Disbury talked over the arrangements for the funeral. His speech was incoherent, but he told Disbury that either a light or lamp caused his death. A cigarette was never mentioned. Parker smoked cigarettes. He knew this because he lived in his home about five or six weeks and had seen him smoke them.

Frederick Champagne, a fellow employee, testified that his attention was called to Parker by hearing him cry out for help. He had seen him five minutes before as he finished his lunch, at about five minutes of 12. He tried to put the fire out, but Parker would not keep still. He continued to run around the shop, and everywhere he ran oil would drip onto the floor and pieces of clothing fell; then there would be a flame. Parts of the factory were burned, and firemen came, and one of the men asked if he had helped Parker. Nothing was said then about a lamp. There are electric and arc lights in the shop and lanterns were also used; if you wanted to be "fussy" and have perfect work you used a lantern. The men sometimes did that, and Parker had used a lantern previous to the night of the accident, to his knowledge, about two or three times, — used it to look at the rolls. The lantern used was what is known as a "watchman's lantern," not supposed to break and about 3 feet high. One lantern was used by the workmen and it was not the watchman's lantern. He thought there was a lantern left beside the watchman's lantern for the use of the workmen, and it was kept in different places, where the workmen used it. It was customary to ask the watchman for a lantern. Parker's machine had been running while he was eating. He could see Parker from his end of the room.

A torch was sometimes used, but there appeared to be no occasion for its use on Parker's machine, and on the night of the accident the lights in the mill were in fairly good order, there apparently being no occasion for the use of a lamp.

George L. Bronson, who stated that he was "foreman of the rolls," stated that he never knew of the use of a torch in Parker's shop. In explanation of the use of the word "shop" he stated that all the "shops" were in one room and on the same floor, with no regular partitions between them. There was only one lantern used, and that was down at the roughing place, a watchman's lantern, about 75 feet away from Parker's machine. The torches were in the machine shop, about 25 feet away. He made an examination six hours after the accident, not looking for anything in particular, but looking around for the purpose of ascertaining what caused it. He had left the shop at 9.30 P.M., several hours before the accident, and could not say what was used after that. In his opinion, no one could get a lantern unless he went to the storeroom or to the watchman. He could not say how many lanterns were kept in the storeroom, and did not go into the storeroom to see if any were missing. He did not find a cigarette.

Joseph G. Menzer, superintendent of the plant, went to the scene of the accident between 6 and 6.30 in the morning, desirous of ascertaining its cause, and began looking for anything that might possibly have caused it. He found absolutely nothing near Parker's machine. An alarm had been rung in, the fire department had come, firemen had been in the room.

James W. Kane, foreman in the rolling mill, stated that while talking to Mr. Cook, the morning after the accident, Mr. Suprenant picked something out of the machine and threw it out of the window. He could not say whether it had been burned or not. It was a cigarette, and he stated that it was found inside of the frame of one of Parker's three machines.

Joseph Suprenant came to work at 6.20 A.M. of the morning following the accident and found no trace of a torch near the machine. He had left the night before at 9.30, at which time Parker was making a burlap apron, which he noticed was

oily. He found a cigarette in the machine known as No. 2, near No. 3 machine, and threw it out of the window. He could swear the cigarette offered in evidence was the one thrown out of the window, as he knew the kind Parker smoked. It was a "Zira." It was found at about 8.20 A.M. He also found a 5-gallon oil can with a dent in it on the floor, and noticed oil on floor near wall. The oil can was out of its usual position, the place for it being on a little horse on No. 1 machine.

James H. Loveridge testified that he was talking to Parker just before the accident and was about 18 inches away from him. Parker was rolling a cigarette with a match in his hand. He had not lighted the match. He did not think the cigarette presented in evidence was the one Parker was making. He then went to his own machine, about 75 or 80 feet away, and was giving it attention, as it was running badly, when he saw Parker running down in the flames. A torch was kept on his rolls, and when a torch was not used, a lantern was.

Frank Murray, the night watchman, testified that Parker did not have one of his lanterns on the night of the accident, but that he had let him take lanterns occasionally. He could not remember the last time before the accident that he had loaned Parker a lantern, but it was within two or three nights. He had taken the lantern about four times in six weeks. He lighted it himself in the yard or shipping room, and then brought it to Parker's machine and left it there.

John H. Barrows testified that he had made out the report of the injury filed with the Industrial Accident Board, but said nothing about a cigarette as being its cause. As to wages, he stated that the plant has been very busy for a year past, working overtime, night men working seventy-seven and one-half hours during the first five working nights and five and one-half hours on Saturday, — a total of eighty-three hours, at 16½ cents per hour. Regular time would be fifty-eight hours at the same rate. Regular time for a night man is sixty hours, without overtime.

Clarence A. Cook testified that the shops run, when not busy, fifty-eight hours per week; when busy, until 9.30 at night, pay being given for a total of eighty-three hours. Some-

times the day force runs until 9.30, and the others come on at 6 o'clock and work all night.

The evidence as to the use of a cigarette by the employee was not convincing, and is dismissed by the committee as not being a factor in causing his death. The witness Suprenant testified to having found a cigarette in one of the three machines used by Parker; and although it was thrown out of the window, he swore that it was the identical cigarette found by him in said machine, when questioned at the hearing. He further testified that it was a "Zira" cigarette. There was no evidence by him or any one else that Parker had ignited that cigarette, or any cigarette, on the night of the injury. Another witness, Loveridge, testified that he saw Parker rolling or making a cigarette, having an unlighted match in his hand while so engaged in making the cigarette, but he did not see him light the cigarette. This could not have been a "Zira" cigarette, since a "Zira" is a manufactured article. Another question arises as to whether a man may conveniently hold a match in his hand while rolling or making a cigarette. It is rather improbable that Parker held a match in his hand if he was making a cigarette.

Lamps and torches were used in the factory at times, and Parker had occasionally used a lamp in connection with his work; and the evidence is that a lamp, according to the testimony of Mrs. Ada Parker and Mrs. Mary Bailey, and either a lamp or light, according to the testimony of Robert Disbury, was the cause of the fatal injury, this being the reason given by the said employee upon his death bed at the hospital at a time when he knew that death was only a question of a few hours. He made no mention of cigarettes in any way. The lamp was all ablaze and he threw it from him in an endeavor to escape his terrible fate. Such a statement, made under such solemn circumstances, with the knowledge that only a few moments separated him from death, must be given full consideration and weight. The fact that there is no affirmative evidence to show that a lantern was found is not of weight, in view of the further fact that the fire alarm was sounded and many firemen had been in the factory, which, with the resulting confusion, might well have

rendered a search made some six or eight hours after the accident for any apparent cause unavailing. It has been shown in evidence that Parker's clothing was saturated with oil, and that everywhere he ran oil dripped and pieces of clothing fell, followed by flames from the oil drippings. Where did the oil come from? Neither his clothing nor the burlap apron he wore could ordinarily have been so saturated with oil that it would drip onto the floor and burst into flames when his burning clothes dropped off. The probable and reasonable cause of the presence of oil in such excess quantity may well be traced to the lantern, which the deceased himself stated on his death bed was the real cause of the injury.

The committee agreed that the average weekly wages of Albert Parker were \$11, and so finds. The committee further finds that the personal injury which caused the death of Albert Parker, the said employee, arose out of and in the course of his employment, and that Ada Parker, the widow who lived with him as his wife at the time of his death, is conclusively presumed to be wholly dependent upon him for support, and that the said Ada Parker is therefore entitled to the payment of \$5.50 weekly for a period of three hundred weeks from the date of the injury on Sept. 16, 1913.

JOSEPH A. PARKS.

WILLIAM ACTON.

THOS. A. TRIPP.

CASE No. 497.

MICHAEL O'BRIEN, *Employee*.

TAYLOR-BURT COMPANY, *Employer*.

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., *Insurer*.

WM. TEAHAN, M.D., *Physician*.

EMPLOYEE JUSTIFIED IN ENGAGING HIS OWN PHYSICIAN AND REASONABLE FEE AWARDED FOR SERVICES RENDERED.

The employee, not being satisfied with the medical services furnished by the insurer's physician, engaged his own physician and claimed compensation on account of his liability to said physician for the services rendered. It was agreed that the employee was justified in engaging his own physician. *Held*, that the employee was entitled to a reasonable allowance for medical services.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Michael O'Brien v. Employers' Liability Assurance Corporation, Ltd., this being case No. 497 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of James B. Carroll of the Industrial Accident Board, chairman, James Clark, 190 East Dwight Street, Holyoke, representing the employee, and Thomas H. Kirkland, 31 Elm Street, Springfield, representing the insurer, heard the parties and their witnesses at the Aldermanic Chamber, City Hall, Holyoke, Mass., on Tuesday, Dec. 9, 1913, at 2 P.M. T. Francis Maher, Esq., appeared for the insurer as counsel, and the employee was not represented by counsel.

The question in dispute is the amount to be allowed the employee in payment of Dr. Teahan's bill during the first two weeks following the injury.

Michael O'Brien, the injured employee, while working for the Taylor-Burt Company, was injured July 9, 1912, at 5.45 P.M.

Dr. William Teahan testified: —

O'Brien came to my office and at first I did not want to treat him. It seems after he was hurt he went to the company's doctor, Dr. Witherell, and he sewed up the wound in some way and then turned him over to Dr. Minor, who saw O'Brien three or four times. O'Brien was not satisfied with the treatment of Dr. Minor. He had a wound on his left arm about 3 inches long, running from the ulnar to the radial side. This was superficially sutured and the wound was suppurating. There was hair still on his arm, which would indicate it was rather hastily sewed in the office of the doctor. Between the sutures pus was oozing out. The muscles and tendons had been severed and there was no attempt to unite them, and as a result three of his fingers contracted into the palm of his hand. In an operation of this kind we do not look for good results. Considering I had three physicians at the operation, \$150 is very reasonable. This bill of \$150 is primarily for the operation. If we did not operate on his hand, it would have been useless. This operation took about two hours. When a person is operated on, a surgeon charges for the operation, and the rest of the visits which are necessary are included in the primary fee. After the operation I called

at the hospital about every day for six weeks. There was need of two assistants in this operation, one to mop up the blood and the other to retract the muscle. I paid these men each \$10. Then there was the doctor who gave the ether, and his fee was \$5. Dr. Rosenbull gave the ether and Drs. Brady and Doolan assisted.

Dr. Witherell testified: —

O'Brien came to my office and had a wound on his left arm about 3 inches long, and it was bleeding quite a good deal. Suggested that he go to the hospital because it was a hospital case, but he did not want to. I closed the wound. I did not suture the muscles, but did suture the skin and did it up antiseptically. I just saw him that day, July 9, 1912. I was going away on a vacation, but he reported at my office just the same and Dr. Minor treated him. For an operation of this kind should think I might get \$75, but it would depend on how much I had to attend to him afterwards. I don't think there is anything to show the minimum or maximum price for these operations.

Dr. Minor testified: —

It was my duty to look after Dr. Witherell's cases when he went away, and Mr. O'Brien was one of them. When he came to see me the day after the injury I took down the dressing, cleansed the wound as best I could, and did not disturb the arm very much. I put it up in the same position as I found it, put on a clean bandage, and the last time I saw him his arm was swollen considerably, but we expect this in a condition of this sort. His fingers were somewhat flexed, but because of the amount of swelling I did not think that was very much amiss. In fact, I did not test the fingers because I knew some operation had been performed, and I did not want to disturb it. I saw him three times, and then Dr. Teahan telephoned that Mr. O'Brien had come to him and he was going to look after the case.

It was agreed that Michael O'Brien was justified in hiring Dr. Teahan.

On this evidence we find that Michael O'Brien is entitled to payment, to the amount of \$125, for medical attention covering the first two weeks following the injury, the only question in this case being the amount of the doctor's bill.

JAMES B. CARROLL.

JAMES CLARK.

THOMAS H. KIRKLAND.

CASE No. 499.

ANNIE MALLOY, WIDOW OF WILLIAM J. MALLOY, *Employee*.

WILLIAM J. FALLON, *Employer*.

FIDELITY AND CASUALTY COMPANY OF NEW YORK, *Insurer*.

PERSONAL INJURY, RESULTING FATALLY, AND ARISING OUT
OF A QUARREL PRECIPITATED BY THE EMPLOYEE, NOT
COVERED BY ACT.

The employee received a personal injury, resulting fatally, by reason of a quarrel with a fellow employee, said quarrel being precipitated by the deceased without cause. The employee struck another employee, the latter clinching with him, and the deceased fell back against the machine. He never regained consciousness.

Held, that the injury did not arise out of and in the course of the employment.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Annie Malloy, widow of William J. Malloy, v. Fidelity and Casualty Company of New York, this being case No. 499 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Joseph A. Parks, chairman, representing the Industrial Accident Board, Richard Baker, Esq., 122 Calumet Street, Roxbury, representing the widow, and Benjamin B. Piper, Esq., 53 State Street, Boston, Mass., representing the insurer, heard the parties and their witnesses in the Hearing Room, 1 Beacon Street, Boston, Mass., Monday, Aug. 10, 1914, at 9.30 A.M.

John M. Morrison, Esq., represented the insurer.

It was agreed that the average weekly wages of the employee, William J. Malloy, were \$11; that the injury occurred on Sept. 30, 1913, and that the employee died without regaining consciousness.

The only point in dispute was as to whether the injury arose out of and in the course of his employment, the insurer claiming that the employee's death was the result of a quarrel with a fellow employee, as a result of which he received the injury which caused his death. William Malloy, the employee, was

a machine operator in the currying department of the welting manufactory of the subscriber, William J. Fallon, and received the injury which caused his death by reason of a fractured skull, caused by coming in contact with the "jack" of his machine, which was in operation at the time.

Mrs. Annie Malloy, widow of the deceased, testified that she lived with her husband at the time of his death.

Frederick H. Townsend, 33 Forest Street, Roxbury, testified that he was foreman for the employer, and that both Michael Shannon and the employee Malloy were "good, sober and industrious workers," the former working for the subscriber for about six years and the latter from May until September. On the morning of the injury Mr. Townsend went into the office a few minutes before 7 and changed his clothing, proceeding to the workroom shortly after that hour. Mr. Malloy, with a smile and a wink, told him that he wished he would make Mr. Shannon get to work at 7 o'clock, the same time as the rest of the men. Shannon was stooping down at the time, probably lacing his shoes, and Mr. Townsend did not say anything. He did, perhaps, smile. He then left the room, and in a short time heard that Malloy had been seriously injured. He returned and found Malloy on the floor near his machine. A call was sent for the ambulance and Malloy was taken to the Relief Station. He was unconscious and did not regain consciousness.

John Critch, 16 Shirley Street, Roxbury, testified that he was a fellow employee of Malloy's and had worked for the subscriber for about nine years. On the morning of the injury he saw Malloy standing on a pile of leather about 14 to 16 inches high. Shannon and Sharkey were near by in conversation. Without warning, so far as he knew, Malloy hit Shannon on the jaw and the latter fell to the floor. This occurred shortly after 7 o'clock. Malloy waited for Shannon to arise, and then made another lunge with his arm. They both clinched, Malloy falling back against the machine and being hit only once by it. He never regained consciousness.

Michael Shannon, Woodville Avenue, Boston, testified that he had worked five or six years for his employer and that his

relations with Malloy, the deceased, had always been friendly. On Sept. 30, 1913, he got in shortly after 7 o'clock, and Malloy wanted to know why he did not get in earlier. He told Malloy that he had "too much mouth" so early in the morning. This conversation occurred after Mr. Townsend passed by. Shannon was standing at his machine at the time, changing his clothes, when Malloy gave him a punch in the jaw. He was not prepared for such an occurrence and fell to the floor. When he got up, he was not ugly about it, but clinched with Malloy because he was afraid the latter would hit him again and he wanted to get away. While in the clinch, Malloy fell backward on his machine, which was in operation, and was hit by it. He received a wound on the forehead and never regained consciousness.

Martin Sharkey, 37 Dennis Street, Roxbury, testified that he had worked for the subscriber for over two years and knew both of the participants in the quarrel. He heard a great deal of loud talk on the morning of the injury from Malloy, and later saw Malloy strike Shannon on the jaw. Shannon fell to the floor and after he got up Malloy struck at him again, and both clinched. In breaking away from the clinch, Malloy fell on the machine and was injured. Sharkey went to his assistance, Mr. Critch stopping the machine, and both took him away from it.

The evidence shows that the personal injury received by the employee, William J. Malloy, did not arise out of and in the course of his employment and the committee so finds. The injury did, however, arise out of a quarrel precipitated, apparently without cause, by the said employee, and his death, which was probably instantaneous, had no connection with his employment. The sudden and unforeseen result of the employee's criticism of the lateness of a fellow employee, and what appears to have been his unwarranted attack upon the said fellow employee because of the latter's resentment of his criticism, shows that such "horse play" should be discouraged in every possible way in order that serious and even fatal injuries should not occur. The most serious phase of the case under consideration is the plight of the dependent

widow, to whom the committee cannot, under the law, award compensation. The claim of the said widow must therefore be dismissed.

JOSEPH A. PARKS.

BENJAMIN B. PIPER.

Richard H. Baker dissents.

CASE No. 508.

THOMAS H. MELEY, *Employee*.

A. T. STEARNS LUMBER COMPANY, *Employer*.

MASSACHUSETTS EMPLOYEES INSURANCE ASSOCIATION, *Insurer*.

ADDITIONAL COMPENSATION AWARDED SEPARATELY ON ACCOUNT OF THE PERMANENT INCAPACITY FOR USE OF THE RIGHT HAND AND THE LITTLE FINGER OF LEFT HAND. SUPREME JUDICIAL COURT AFFIRMS DECISION OF BOARD.

The evidence shows that the employee received a personal injury which caused the right hand and the little finger of the left hand to be permanently incapacitated for use.

Held, that the employee was entitled to "additional" compensation for fifty weeks for the permanent incapacity of the hand, and twelve weeks for the permanent incapacity of the finger.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to Supreme Judicial Court.

Decision. — The Supreme Judicial Court affirms the findings of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Thomas H. Meley v. Massachusetts Employees Insurance Association, this being case No. 508 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Joseph A. Parks, representing the Industrial Accident Board, chairman, Francis J. Horgan, Esq., 6 Beacon Street, Boston, Mass., representing the employee, and Francis V. Barstow, Esq., 53 State Street, Boston, Mass., representing the insurer, heard the parties and

their witnesses at the Hearing Room of the Industrial Accident Board, Pemberton Building, Boston, Mass., Friday, Nov. 14, 1913, at 10 A.M.

It was agreed that the employee received a personal injury arising out of and in the course of his employment, and that his average weekly wages were \$14.07. He was employed as a machine hand in the molding room, and while cutting finishing material his hand slipped and fell on the circular saw, which cut through the fifth metacarpal bone and tissues, through the entire front of the right hand, and through the third and fourth fingers of the left hand. He is totally incapacitated for work and will be so incapacitated, on account of the injury, for an indefinite period.

The question at issue was as to the amount of additional compensation due under chapter 445, Acts of 1913, effective at the time of the injury, the insurer and the employee not being able to agree, the insurer claiming that not more than twenty-five weeks' additional compensation was due, and the employee claiming that he was entitled to twelve weeks' additional compensation on account of the injury to the fourth finger of the left hand, and to the payment of fifty weeks' additional compensation for the loss of the use of the right hand, which he claimed was incapable of use.

William M. Brooks, M.D., for the insurer, testified that he examined the employee on Oct. 20, 1913, and found that there was a saw cut across the palms of both hands, most of the flexor tendons of the right hand being cut. All that remained of the condition of the left hand is stiffness of the little finger, and this stiffness is permanent because there is no power of flexion. It is always in the way, and if amputated there would be full use of the left hand. The right hand was cut across; there is no power of flexion in it and the fingers cannot be spread. He has a certain amount of use of the thumb, and he will undoubtedly have quite a little use of it, and could use it as a hook to carry things. A curved steel splint could be used which would not hurt the hand, and it would be much better than amputation. The flexor tendons are cut in the thumb. Summing up, the doctor concluded that there is very little power to hold anything between the thumb and hand, and as

to his ability to use it to work with, it can be used only to the extent of using it as a hook. It might improve a little, but not much, and it will always practically remain the same. The little finger of the left hand is useless. The right hand is incapable of use except as a support for a hook. He cannot do any work now.

Dr. Samuel H. Calderwood, who examined the injured employee as the impartial physician appointed by the Industrial Accident Board, stated that the right hand is permanently disabled, having become contracted in the process of healing.

Upon this evidence the committee of arbitration finds that the employee, the said Thomas H. Meley, received a personal injury arising out of and in the course of his employment, and that he is entitled to compensation at the rate of \$7.04 per week, said compensation having been paid him weekly in accordance with the terms of the act by the said insurer.

We find that he is now totally incapacitated for work, and that the period of his total incapacity is indeterminable. The committee of arbitration finds that the right hand of the said employee has been so injured as to be incapable of use, and that the incapacity of the right hand is permanent, there being due the said employee on account of this incapacity, in accordance with chapter 445, Acts of 1913, a weekly payment of \$7.04 for a period of fifty weeks from the date of the injury, May 21, 1913, making a total sum due of \$352.

The committee also finds that the little finger of the left hand is so injured as to be incapable of use, and that the incapacity of the said finger is permanent, there being due the said employee on account of this incapacity, in accordance with chapter 445, Acts of 1913, additional weekly payments of \$7.04 for a period of twelve weeks from the date of the injury, — a total of \$84.48.

The committee finds that the total sum due on account of additional compensation is \$436.48, and there is also due for an indeterminate period, on account of total incapacity for work, a weekly payment of \$7.04 for a period not to exceed five hundred weeks, and an amount not to exceed \$3,000, subject to a change in the status of the employee, depending upon

his ability to earn wages at work which he can obtain, and which the incapacity due to the injury will not prevent him from performing.

JOSEPH A. PARKS.

FRANCIS J. HORGAN.

F. V. Barstow dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, Pemberton Building, Boston, Mass., Thursday, Dec. 4, 1913, at 3.45 P.M., and affirms and adopts the findings of the committee of arbitration

JAMES B. CARROLL.

DUDLEY M. HOLMAN.

DAVID T. DICKINSON.

EDW. F. MCSWEENEY.

JOSEPH A. PARKS.

Decree of Supreme Judicial Court on Appeal.

SHELDON, J. It is admitted that compensation rightly was awarded to Meley for a total incapacity for work. In Sullivan's Case, 218 Mass. 141, the only question raised upon the insurer's appeal is whether he was entitled to any, and what, additional compensation for the injuries to his hand under the provisions of the Workmen's Compensation Act, St. 1911, c. 751, Part II., § 11, as amended by St. 1913, c. 445. This amendment provides that the additional amounts to be paid, "in case of the loss of a hand, foot, thumb, finger or toe," shall also be paid "in case the injury is such that the hand, foot, thumb, finger or toe is not lost, but so injured as to be incapable of use: *provided*, that when the incapacity ceases the said additional payments shall also cease." The insurer contends that the words "incapable of use" require a total incapacity for use. Assuming this to be so, it has been found by the Industrial Accident Board, affirming the findings of the committee of arbitration, that the right hand of this employee "has been

so injured as to be incapable of use," and that the incapacity is permanent. If this finding was warranted upon the evidence, it is conclusive. (Herrick's Case, 217 Mass. 111; Bentley's Case, 218 Mass. 158, 160.) We cannot say that it was unwarranted. The hand was cut across and most of the flexor tendons were severed. Those in the thumb were cut. A physician testified that the hand was permanently disabled. The Board was not required to accept as decisive the testimony of the physician called by the insurer. Even that testimony went little farther than to say that some things might be carried on the thumb as a hook, and that a steel splint might be used which would not hurt the hand, and that this would be much better than amputation. But we find no evidence that even with such an appliance there would be any real ability to use the hand. Certainly it could be found that the normal use of the hand was wholly gone, so that the hand was "so injured as to be incapable of use." The incapacity of use need not be tantamount to an actual severance of the hand; it is enough that the normal use of the hand has been taken entirely away. This is the reasoning of *Garcelon v. Commercial Travelers Eastern Accident Association*, 184 Mass. 8, and *Genest v. L'Union St. Joseph*, 141 Mass. 417.

Still further compensation was allowed to Meley on the finding that the little finger of his left hand was so injured as to be incapable of use. Plainly, the finding of fact was warranted. But the insurer contends that the hands are not to be considered separately, and that additional compensation cannot be given for the incapacity to use one finger of the other hand. The insurer's argument has some plausibility, but the plain words of the statute are against it. It is settled that the statute provisions are to be construed liberally for the protection of the injured employee, whose rights to compensation, either at common law or under the Employers Liability Act (St. 1909, c. 514, §§ 127 *et seq.*), it has taken away. (*Donovan's Case*, 217 Mass. 76, 79.)

It cannot be said that this appeal was prosecuted without any reasonable ground, and we ought not to charge "the whole cost of the proceedings" upon the insurer, under the provisions of St. 1911, c. 751, Part III., section 14. Accordingly, we

need not consider whether the words "whole cost" mean all the expenses which reasonably have been incurred, or include only the amounts which would be included in the taxable costs of ordinary civil actions.

The decree of the Superior Court must be affirmed.

So ordered.

CASE No. 511.

MAX KRULLA, *Employee.*

GEM MANUFACTURING COMPANY, *Employer.*

CASUALTY COMPANY OF AMERICA, *Insurer.*

EMPLOYEE, WHO WAS DILIGENT IN HIS SEARCH FOR WORK
AND UNABLE TO OBTAIN SAME BY REASON OF THE IN-
CAPACITY DUE TO THE INJURY, ENTITLED TO COMPENSATION.

The employee received a personal injury which necessitated the severance of two fingers of the right hand, and was subsequently furnished work which he was unable to perform. He was thereupon discharged, and the insurer declined to pay compensation. The employee searched diligently for work, but was unable to obtain any work which he could perform because of the incapacity due to the injury.

Held, that he was entitled to compensation on the basis of no wage-earning capacity.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Max Krulla v. Casualty Company of America, this being case No. 511 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of Dudley M. Holman of the Industrial Accident Board, chairman, Walter Isidor of Boston, representing the employee, and Atherton N. Hunt of Boston, representing the insurer, heard the parties and their witnesses in the Aldermanic Chamber, City Hall, Everett, Mass., on Tuesday, Nov. 18, 1913, at 10.30 A.M.

It was agreed by the attorneys that Max Krulla was employed by the Gem Manufacturing Company, and that while in the course of his employment on Oct. 28, 1912, he was injured, losing the first two fingers of his right hand, and that the insurance company had made twenty-five payments of \$4

each for the loss of the two fingers by severance, and had paid \$62.86 for total incapacity to March 1, 1913, and \$8.20 partial incapacity from March 1, 1913, to May 10, 1913, at which time he left the employ of the Gem Manufacturing Company.

It appeared in evidence that after the accident, beginning with March 1, 1913, he returned to work at the factory, though in the crippled and tender condition of his hand the work which he was assigned to do was very painful, and that he continually reported that he was unable to do the work. The acid on some of the waste which it was his duty to pick up also made the injured hand inflamed and very painful, and on May 10 he felt unable to continue the work. He told his employers that it was impossible for him to continue working as he had done, and he was discharged.

It appeared in evidence that he was diligent in his search for work; that he had visited employment offices and went to the Legal Aid Society, but that for a period of two months after his discharge he was unable to obtain any work which he could do. He then secured a position at \$3 a week, with a promise of a raise in the future of 50 cents a week, in a grocery store, carrying out orders in a basket on his arm. When he works with his hand, he testifies, it becomes sore and the wound bleeds. There are still scabs on the hand.

We find, therefore, that Krulla is entitled to total compensation for two months from May 10, and to one-half the difference between the \$3 which he is at present earning and the amount he earned before the accident, to be continued until such time as he secures a higher rate of wages, and that this partial incapacity, as measured by the law, is \$2.65 per week. We also find on the evidence produced that the insurance company paid him only \$4 a week for twenty-five weeks for the loss by severance of the two fingers, when the payments should have been \$4.15 a week, and that they paid him only \$4 during his period of total incapacity, when they should have paid him \$4.15 a week, and that he should be paid this difference by the insurance company.

DUDLEY M. HOLMAN.
WALTER ISIDOR.
ATHERTON N. HUNT.

CASE No. 521.

MRS. MARY FLEMING, MOTHER AND NEXT FRIEND OF THOMAS F. FLEMING, *Employee*.

UNITED SHOE MACHINERY COMPANY, *Employer*.

MASSACHUSETTS EMPLOYEES INSURANCE ASSOCIATION, *Insurer*.

INFLAMMATORY DISEASE OF EYE ACCELERATED BY A PERSONAL INJURY ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT. IMPOSSIBLE TO DETERMINE WHETHER DISORDERED CONDITION OF EYE WAS TRACHOMA, CONJUNCTIVITIS OR OTHER AFFECTED CONDITION.

While the employee, a boy of sixteen, was operating a milling machine, a piece of emery flew into his right eye. A fellow employee removed the particle of emery a day or two after the injury, using the end of a bone or ivory handle of a tooth brush for the purpose. The eye was badly inflamed at the time of the removal of the piece of emery, and the evidence showed that the injury itself, together with the physical effects of removing from the eye the piece of emery with the sharp end of a tooth brush, aggravated and accelerated a sluggish, inflammatory disease of a chronic nature to such an extent as to cause total incapacity for work. The classification of the disordered condition of the eye before the injury seems impossible to be determined with certainty, — whether it was trachoma or conjunctivitis or other affected condition.

Held, that the employee was entitled to compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration, except as such findings are altered or changed by this decision.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Thomas F. Fleming, by his mother and next friend, Mrs. Mary Fleming, v. Massachusetts Employees Insurance Association, this being case No. 521 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of David T. Dickinson of the Industrial Accident Board, chairman, John H. Sheedy for the employee, and Theodore A. Tufts for the insurer, being duly sworn, heard the parties and their witnesses at City Hall, Beverly, Friday, Nov. 28, 1913, at 10.30 A.M.

The committee finds that the employee, a boy of sixteen

years of age, upon April 10, 1913, received an injury arising out of and in the course of his employment. While at work operating a milling machine a piece of emery flew into his right eye, causing the injury.

The boy was taken by a fellow worker to an emergency or first aid department maintained by the employer at the plant, for the purpose of having the particle removed, but the physician or nurse happened to be out. He was then taken to a fellow employee, Arthur J. Boswell, a tool maker and machinist, who had considerable skill in removing foreign particles from eyes. Boswell removed the piece of emery, and testified that before so doing he cleaned his hands with fresh dry waste, and used the end of a bone or ivory handle of a tooth brush. He had sharpened the end of this nearly to a point, and had cut this end clean with a knife for the purpose of producing a sterilized condition, as he stated, before using it. He touched the particle of emery with the end of this handle, and the particle adhered to the handle and was removed. This was either on the first or second day following the injury. The eye was then badly inflamed. The boy continued at work during the usual hours until April 18, 1913, when he was discharged by his superintendent for not doing his work to the satisfaction of the superintendent.

The boy testified that he was then able to do his work at the machine properly, but the committee finds on the weight of all the evidence that his work was not as well done as usual by reason of the injured condition of the eye, and that this was the reason of his discharge. The superintendent was not produced by the insurer before the committee.

The boy's mother took him to the Massachusetts Eye and Ear Infirmary for treatment on April 19, 1913, and thereafter to Dr. Charles W. Haddock of Beverly. According to the testimony of Dr. Haddock at the hearing, the boy was in such a condition on account of his injured eye on May 7 that he was then unable to use it in connection with work. The eye was then suffering from the disease of trachoma or follicular conjunctivitis, well-recognized germ diseases, and not caused primarily by an injury. The boy had not suffered from either

of these diseases before the accident, nor from any other troubles of the eye.

It appeared that his father at the time of the accident showed signs of having suffered previously from trachoma to some extent, but at the time of the boy's accident the condition of the trachoma in the father was that of an old contracted form of the disease of years' duration. The inflammation and suffering in the affected eye of the boy were continuous from the time of the accident for several months following, during which his diseased condition was plainly manifest.

His average weekly wages at the time of the injury from the emery particle were \$6.50.

He was not able to resume work as a practical matter by reason of the infected condition of the eye, and did not do so until Aug. 1, 1913. On August 1, when he resumed work, his eye was swollen and not yet recovered. It was suggested in the medical testimony that the trachoma might have been gotten from contact with the articles used by the father; but it seems that the disease in the father's case was then quiescent, and the boy had never gotten it before from him, and it did not break out in the boy's eye until immediately following the injury from the foreign particle. The pointed handle of the tooth brush had been used frequently by Arthur J. Boswell in removing particles from the eyes of other workers, and the disease could easily have been conveyed to the boy by this implement used on other employees.

From the fact that the disease broke out in the boy's eye immediately following the use of this implement, the committee finds that the infection was communicated by this cause, and it was not unreasonable for the boy to be treated by Mr. Boswell, who had practical skill in removing such particles.

The committee finds that the trachoma or follicular conjunctivitis was the natural result of the reasonable attempt to relieve the condition of the eye from the particle, and hence the injury arose out of and in the course of his employment. He was totally disabled thereby to Aug. 1, 1913, when his incapacity for work ceased and he returned to work. He is en-

titled to a compensation at the rate of \$4 per week from April 25, 1913, the fifteenth day after the injury, to said Aug. 1, 1913, viz., fourteen weeks, amounting to \$56.

This decision and all findings regarding compensation or the existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III., of the Workmen's Compensation Act, and the general provisions of said act and its amendments.

DAVID T. DICKINSON.
JOHN H. SHEEDY.

Theodore A. Tufts dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, New Albion Building, Boston, Mass., on Thursday, Feb. 5, 1914, at 10 A.M.

No new evidence was introduced, the Board adopting a report of the evidence and findings of the committee of arbitration, except as such findings are altered or changed by this decision of the Board.

It was agreed to authorize an impartial examination of the employee, as provided by Part III., section 8, of the Workmen's Compensation Act.

M. Victor Safford, M.D., the impartial physician appointed by the Board, reported in substance as follows:—

An examination of the eyes of Thomas Fleming shows that his eyelids are the seat of a sluggish inflammatory disease of a chronic character. . . . The disease is of such a character and in such a stage that I cannot safely make a definite statement as to its probable duration. I know from the appearance of the condition that it must have existed for months, but would not dare to say whether it had existed for one year or two years or three years, or perhaps longer. Trachoma is a contagious disease, but we have not yet discovered the specific organism of the disease, nor do we know the exact conditions essential to infection with the organism. So far as we know, it is entirely possible for a case of trachoma to be contracted in the manner alleged in this instance, either directly by the fingers, or implements, in the course of manipulation to remove the piece of emery said to have struck the eyeball, or indirectly, by abrading and irritating

the eyeball so that the eye became susceptible to the trachoma infection from some other source. We certainly do not know that trachoma could not be contracted in this way. Even assuming that the disease of the boy's eye is not trachoma, we cannot say that it is not a contagious disease, and that it was not contracted in the manner above described. . . . It is entirely possible and quite probable that Thomas Fleming may have had trachoma in an early stage for a long time before the occurrence of the disease was realized by himself or by any members of his family. In fact, it usually happens that the existence of one of the insidious, slowly progressing cases of trachoma is discovered as the result of an accidental aggravation of the disease caused by some sort of mechanical irritation of the eye, or by an acute infection with some other diseased organisms. This leads the individual to seek medical treatment, and the physician finds the trachoma. After a while the troublesome symptoms will disappear, but the trachoma still continues, perhaps without causing serious annoyance, until something else occurs to bring on another active inflammatory exacerbation. . . .

All the medical testimony that has been brought to my attention in this case relates to the existence of trachoma. Trachoma is primarily a disease of the eyelids. What primarily made this case a subject for your consideration was an injury to the eyeball. There is nothing in the medical testimony I have seen which indicates that Thomas Fleming was not incapacitated for work by reason of the injury to the eyeball from the piece of emery, and efforts at its removal, and that he would not have been incapacitated for work from such cause for a longer or shorter period, regardless of this question of trachoma. It is not necessary to presuppose infection to account for the inflammation of an eyeball which would incapacitate a person for work for a while at least. The tissues of the eyeball are so delicate and sensitive that a piece of emery, and the method employed for its removal, in this instance, might be sufficient to set up a troublesome temporary inflammation in anybody's eye. In fact, from what the boy told me, one would be justified in assuming that such a result did follow, unless there were positive testimony to the contrary. The first medical testimony I have relative to the condition of the boy's eye in this case is that of Dr. Haddock, who first saw the boy on May 7, practically a month after the accident. From the summary of Dr. Haddock's testimony which has been furnished me, I cannot make out whether he regarded either trachoma or follicular conjunctivitis as the sole cause of the condition of the boy's eye, as he found it, or considered the disease as complicating an injury. Anyway, in a case of this sort I don't know how anybody could estimate the extent to which a disability resulting from the inflammation caused by a foreign body and its removal from the eyeball might have been prolonged by some accidental infection by the abrasion of the eyeball, or by a pre-existent trachoma.

The evidence on which I base my assumption that there was sufficient cause in this case to produce a troublesome inflammation of anybody's

eyeball, interfering with work, irrespective of the existence of trachoma, is as follows: my examination shows that the boy's eyeball has suffered no permanent damage of practical importance directly attributable to the injury, but I find on the eyeball a scarred spot such as might have been produced by the inflammation following attempts at the removal of a foreign body.

The boy testified to me, and it appears as a matter of record, that he got the piece of emery in his eye on April 10, 1913. He tells me, but it does not appear as a matter of record, I think, that somebody in the factory made an unsuccessful attempt to remove it with the end of a match the same day, but this testimony is not important to my conclusion. It has been agreed that the foreign body was not removed until the following day, when it was removed by Mr. Boswell, who used a sharpened tooth brush handle for the purpose. By this time, as the boy testified to me, the eye was markedly inflamed, as it might be expected it would be. The removal is described in the report of the committee of arbitration in the following language: "He touched the particle of emery with the end of this handle and the particle *adhered* to the handle." Now anything which has been on an eyeball since the day before is not going to adhere to a stick of this sort with sufficient force to permit it to be lifted off the eye. Even if the particle merely lay on the surface of the eyeball when introduced into the eye, by the next day it would be partially imbedded at least in the swollen tissues, and certainly require some little force or digging, anyway, to remove it. The removal, in this way, of a particle from a sensitive, inflamed eyeball with such an implement as was used is bound to result in more or less injury to the delicate covering of the eyeball in the vicinity of the particle, the extent of the injury depending both on luck and the dexterity of the handler of the implement. Usually no serious results follow, but such is not always the case. Persons whose eyes have been seriously injured in just this way are turning up for treatment at eye hospitals every day, and within a week I have seen reference to a public address by an eminent eye surgeon, in which he warns against the practice of workmen permitting fellow employees to attempt to remove foreign bodies from their eyes. There is no valid evidence to support the contention that, first, the disease of the eyes from which Thomas Fleming is suffering at present resulted directly or indirectly from getting a piece of emery in his eye on April 10, 1913. While such possibility is conceivable, it is far more probable that the disease already existed at that time, and the accident or efforts at the removal of the foreign body from the eye merely served to aggravate the disease and call attention to it. Second, that the accident or efforts at removal of the foreign body from the eyeball may, of themselves, have been sufficient to set up an inflammation of the eye which would have caused temporary disability even though trachoma or other disease of the eye had not existed.

M. VICTOR SAFFORD, M.D.

The Board finds that the personal injury received by the employee, the said Thomas Fleming, on April 10, 1913, together with the physical effects of removing from the eye the piece of emery with the sharp end of a tooth brush on the following day, aggravated and accelerated a sluggish, inflammatory disease of a chronic nature to such an extent as to cause total incapacity for work from that date to Aug. 1, 1913, when all incapacity, as a result of the injury, ceased. The classification of the disordered condition of the eye before the injury seems impossible to be determined with certainty, — whether it was trachoma or conjunctivitis or other affected condition. (Clover, Clayton & Co. v. Hughes, 3 B. W. C. C. 275; M'Innes v. Dunsmuir and Jackson, Ltd., 1 B. W. C. C. 226; Lloyd v. Sugg & Co., 2 W. C. C. 5; Ystradowen Colliery Co. v. Griffiths, 2 B. W. C. C. 357.)

The Board finds that there is due the said employee, on account of total incapacity for work resulting from said injury, a weekly compensation of \$4 from April 24, 1913, the fifteenth day after the injury, to Aug. 1, 1913, viz., fourteen and one-seventh weeks, amounting to \$56.57.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 522.

EDWARD NOLAN, *Employee*.
J. D. SHATTUCK, *Employer*.
NEW ENGLAND CASUALTY COMPANY, *Insurer*.

VALVULAR HEART TROUBLE NOT CAUSED BY AN ACCUMULATION OF STRAINS, AS CLAIMED.

The evidence showed that the condition of valvular heart trouble from which the employee suffered was not caused by an accumulation of strains in carrying and lifting materials, as claimed.

Held, that he was not entitled to compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Edward Nolan v. New England Casualty Company, this being case No. 522 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of David T. Dickinson of the Industrial Accident Board, chairman, Robert T. Russell, for insurer, and Clarence A. Bunker, for employee, heard the parties and their witnesses in the Hearing Room of the Industrial Accident Board, Pemberton Building, Boston, Mass., on Monday, Dec. 1, 1913, at 10 A.M.

In this case the employee claimed that he had caused a valvular leakage in the heart by an accumulation of strains in carrying and lifting materials and articles in the course of his employment. The employee's testimony was not sufficient to show that such a strain was caused by any particular occasion or instance. The opinion of an impartial physician, appointed by the Board, was that strains such as the employee testified he had undergone would not, on any reasonable probability, have been the cause of such a valvular trouble of the heart.

The committee therefore finds that said employee did not receive the trouble complained of by reason of an injury arising out of and in the course of his employment, and that he is not entitled to compensation.

DAVID T. DICKINSON.

ROBERT T. RUSSELL.

CLARENCE ALFRED BUNKER.

CASE No. 532.

HENRY FRANK HATCHMAN, *Employee.*

HOTEL PLAZA COMPANY, *Employer.*

NEW ENGLAND CASUALTY COMPANY, *Insurer.*

AVERAGE WEEKLY WAGES INCLUDE TIPS OR GRATUITIES RECEIVED BY EMPLOYEES DURING THE COURSE OF THEIR EMPLOYMENT.

The employee received a monthly wage of \$30 in cash, and meals to the value of \$30 more from his employer. These earnings were increased by tips or gratuities from the guests of the hotel, an average monthly income of \$80 being received from that source, said tips or gratuities being received by the said employee because of the polite and attentive treatment accorded the guests, in accordance with the conditions of his employment. The insurer claimed that compensation should be based upon a monthly wage of \$60.

Held, that tips or gratuities are earnings, and that the employee's compensation should be based upon all his earnings.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Henry Frank Hatchman v. New England Casualty Company, this being case No. 532 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Joseph A. Parks, representing the Industrial Accident Board, chairman, Thomas F. Waldron, Esq., of Boston, representing the insurer, and William T. Atwood of Boston, representing the employee, heard the parties and their witnesses at the Board Room, Pemberton Building, Boston, Mass., Monday, Nov. 24, 1913, at 10 A.M.

Henry Frank Hatchman, while in the course of his employment by the Hotel Plaza Company, on Aug. 14, 1913, slipped on the floor and sprained his right ankle. The injury was acknowledged by the insurer, but there was a disagreement as to the average weekly wage, the injured employee claiming that the tips he received as a waiter should be counted in his average weekly wage, and the case went to arbitration on that issue.

Henry Frank Hatchman testified that he had been a waiter for eighteen years. He had worked formerly in the Parker House and in the Touraine, and in those places his tips had averaged from \$110 to \$115 per month. The Hotel Plaza, where he was employed at the time of the injury, is what is called a transient house, and the tips ran much higher than in a hotel where private families live. The average during the time he worked there, which was a dull season, in July and August, was \$18 to \$20 per week. The stipulated wages paid waiters by employers were \$30 per month and meals. A part of the duties of a waiter was to be polite and attentive to guests, and in return he was permitted to keep as a part of his earnings the tips given him by the customers or guests of the hotel. Such politeness and attentiveness on the part of the waiter towards the guests were in fulfillment of the duties imposed upon the servant by the master, and understood by the waiter as a part of the conditions of his employment. A successful waiter was a valuable asset to the hotel.

Mrs. Sarah Hatchman, wife of the injured employee, corroborated her husband's testimony as to the amount of tips he received, stating that he gave her the money every night, and that the amounts ran as high as \$6.50 and \$7, and never less than \$3.50 per night. She also testified that she had taken care of her husband for four weeks after the accident night and day, and during the first two weeks she had paid out for medicines, crutches, absorbent cotton, alcohol, anklets, etc., \$11.10.

Joseph Hymes, manager of the Hotel Plaza, testified that employees are not hired in contemplation of their making any money whatsoever in addition to their monthly salary and board. They receive \$30 per month and meals, which are worth \$1 per day, making a total of \$60 per month that the job would be worth. When waiters are engaged, tips are not reckoned in any way, shape or form.

Edward P. Powers, M.D., and James O. Lacaillade, M.D., testified regarding their treatment of the injured man, and a report of an examination made by Frederic J. Cotton, M.D., was submitted. It was agreed that the employee was still incapacitated for work.

The committee finds on this evidence that the employee,

Hatchman, received the going market rate of wages of \$30 a month in cash, and meals to the value of \$30 from his employer; and that these earnings were increased by tips or gratuities from the guests of the hotel by an average monthly income of \$80, said tips or gratuities being received by the said employee because of the polite and attentive treatment accorded the guests in accordance with the conditions of his employment. The committee rules and finds that these tips or gratuities are earnings of said employee, and should be considered as a part of his average weekly wages as defined in section 2, Part V., of the act. The committee finds, therefore, that his average weekly wages are \$32.66 a week, and being totally incapacitated for work he is entitled to the payment of the maximum of \$10 a week during the continuance of said total incapacity, dating from Aug. 28, 1913, the fifteenth day after the injury. The employee is also entitled to the payment of a reasonable sum for money expended for or on account of his liability for medical services and medicines during the first two weeks after the injury.

This decision and all findings regarding compensation or the existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III., of the Workmen's Compensation Act, and the general provisions of said act and its amendments.

JOSEPH A. PARKS.
THOMAS F. WALDRON.
WILLIAM T. ATWOOD.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, New Albion Building, Boston, Mass., Thursday, Jan. 15, 1914, at 3.30 P.M., and affirms and adopts the findings of the committee of arbitration.

The Board further finds that, according to the custom in the conduct of the business of the hotel in which the employee was engaged, and the prevailing custom in the hotel business

generally, the employee, in common with other waiters of the hotel, received and was permitted to keep as his own tips or gratuities received from the patrons of the hotel and the dining room in which the services rendered by him were performed. The custom of tipping was well known to the employer, and the employee entered into contractual relations with him with the expectation that his earnings would be materially increased by the receipt of tips or gratuities.

It has been held in many English workmen's compensation cases that "earnings" need not necessarily come from the employer, and where the employment is of such a nature that the habitual giving and receiving of tips is open and recognized, as in this case, and known to and recognized by the employer, as was also the case here, the money thus received becomes a part of the "average weekly wages" of the employee, and brings said money within the meaning of these words as used in the statute. "Average weekly wages" are defined to mean the "earnings of the injured employee during the period of twelve calendar months immediately preceding the injury," and the earnings of the said employee were \$30 monthly in cash from his employer, \$30 monthly from his employer in meals, and tips or gratuities from the guests of the hotel to the amount of \$80 monthly, making an average weekly wage of \$32.66. (*Penn v. Spiers & Pond, Ltd.*, 1 B. W. C. C. 401; *Knott v. Tingle, Jacobs & Co.*, 4 B. W. C. C. 55; *Skailes v. Blue Anchor Line, Ltd.*, 4 B. W. C. C. 16; *Great Northern Railway Co. v. Dawson*, 7 W. C. C. 117.)

The Industrial Accident Board finds that the said employee is totally incapacitated for work as a result of a personal injury arising out of and in the course of his employment, the period of said total incapacity being indeterminable, and that there is due the said employee a weekly payment of \$10, the maximum under the statute, dating from Aug. 28, 1913, the fifteenth day after the injury, and continuing during the period of his incapacity for work, in accordance with the terms of the act.

JAMES B. CARROLL.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 536.

MRS. ROSANA FARRELL, WIDOW AND DEPENDENT OF JOHN A. FARRELL (DECEASED), *Employee*.

JOHN E. COUSENS COAL COMPANY, *Employer*.

CASUALTY COMPANY OF AMERICA, *Insurer*.

FATAL INJURY TO EMPLOYEE BY REASON OF STRAIN IN CRANKING A COAL DELIVERY WAGON CAUSES HEMORRHAGE IN BRAIN, SAID INJURY ARISING OUT OF THE EMPLOYMENT.

The employee received a fatal injury by reason of the cranking of a coal delivery wagon, the strain of his effort in turning the crank causing a small blood vessel to break in the pial membrane of the brain. The testimony showed that he collapsed, falling to the ground in an unconscious condition. A recurrence of the hemorrhage caused death.

Held, that the personal injury arose out of and in the course of his employment.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Mrs. Rosana Farrell, widow and dependent of John A. Farrell, deceased employee, v. Casualty Company of America, this being case No. 536 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of David T. Dickinson, chairman, Owen H. Lynch for the widow, and Clinton L. Bancroft for the insurer, being duly sworn, heard the parties and their witnesses at the Hearing Room of the Industrial Accident Board, Dec. 9 and 16, 1913.

The committee finds that the deceased employee, John A. Farrell, on Aug. 30, 1913, was in the employ of John E. Cousens Coal Company, and on said day received an injury arising out of and in the course of his said employment, which resulted in his death on Sept. 3, 1913. At the time of the injury, on August 30, he was cranking a coal delivery wagon preparatory to unloading.

The committee finds on the preponderance of the evidence that the strain of his effort in turning the crank caused a small blood vessel to break in the pial membrane of the brain. The testimony showed that he collapsed while turning the crank,

immediately falling to the ground in an unconscious or semi-conscious condition.

Dr. Timothy Leary, medical examiner of Suffolk County, who performed the autopsy, testified at the hearing, and it appeared from his testimony in connection with the other evidence submitted, that the first break in the cerebral blood vessel must have been great enough to have provoked temporary hemorrhage and unconsciousness; that the hemorrhage stopped and consciousness returned; that the hemorrhage then broke out again later through the weak spot and into the ventricles of the brain, and thereby caused death on September 3.

The committee finds that the claimant was the wife of the deceased and was living with him at the time of his death, and that she was wholly dependent upon him for support at the time of the injury, that his average weekly wages at the time of said injury were \$14.70. The employee lost four weeks' time during the twelve calendar months immediately preceding the date of the injury, and this four weeks was deducted from the period of fifty-two, making the divisor forty-eight and thus arriving at said average weekly wages. The earnings of the deceased during the period of twelve months immediately preceding the date of the injury were divided by forty-eight. The claimant, said Mrs. Rosana Farrell, is entitled to a weekly compensation of \$7.35 for a period of three hundred weeks from Aug. 30, 1913, the date of the injury.

DAVID T. DICKINSON.
OWEN H. LYNCH.
CLINTON L. BANCROFT.

CASE No. 554.

EMILE VITALE, *Employee.*

STONE'S EXPRESS, INC., *Employer.*

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *Insurer.*

BOARD DECIDES THAT COMPENSATION SHALL CEASE IF EMPLOYEE FAILS TO HAVE SIMPLE OPERATION PERFORMED WITHIN REASONABLE TIME AFTER INSURER REQUESTS IT.

The evidence before the committee of arbitration showed that the employee was incapacitated for work by reason of a personal injury, due to infection.

Held, that the employee was entitled to compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration, and decides that compensation shall cease if employee declines to have a simple operation performed upon request of insurer.

Report of Committee of Arbitration.

The arbitration committee, appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Emile Vitale v. Fidelity and Deposit Company of Maryland, this being case No. 554 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of David T. Dickinson of the Industrial Accident Board, chairman, Mr. Arthur F. Keefe, for employee, and Mr. Addison M. Goldsmith, for insurer, heard the parties and their witnesses in the Aldermanic Chamber, City Hall, Lynn, Mass., on Monday, Dec. 15, 1913, at 10.30 A.M.

The committee finds that this employee on Sept. 11, 1913, received an injury arising out of and in the course of his employment. He was employed as an expressman, and while handling boxes the point of a wire nail ran into a finger of his right hand. He notified his superintendent orally of the occasion and cause of the injury, but has not given a written notice.

The committee finds that his employer and insurer had knowledge of the injury and that the employee is not disentitled to compensation by reason of the lack of a written notice. The

finger became infected through blood poisoning, and a surgical operation was performed thereon. He was totally incapacitated from work thereby until Nov. 18, 1913, when he obtained work with the Houghton Heel and Leather Company. He had at a previous period worked for this last-named employer, and when he took this work on November 18 his right hand was partly disabled from work by reason of the injured finger, and he obtained the position largely out of consideration for him as a former employee. The average weekly wages of the employee at the time of the injury were \$13, and the average weekly wages from Nov. 18, 1913, to Dec. 6, 1913, from the Houghton Heel and Leather Company, were \$6.33; from December 6 to December 13 his average weekly wages have been, and will probably continue, at the rate of \$12.

The committee therefore finds that the employee is entitled to \$58.78 as compensation up to Dec. 13, 1913, and from said December 13 is entitled to a compensation of 50 cents per week, the latter being one-half the difference between his present average weekly wage of \$12 and that of \$13, which he was earning at the time of the injury. The employee would probably find difficulty in obtaining work at an average weekly wage as much as \$12 if he should lose his present position by reason of his present physical condition, resulting from the injury to said finger.

The amount of compensation now due at the date of this hearing, viz., \$58.78, was reached by this computation: seven and three-sevenths weeks, viz., from September 26, the fifteenth day after the injury, to Nov. 18, 1913, for total incapacity, at the rate of \$6.50 a week; three weeks' partial incapacity at the rate of \$3.33 per week, viz., from November 18 to Dec. 6, 1913; one week's partial incapacity from Dec. 6 to Dec. 13, 1913, at the rate of 50 cents per week.

This decision and all findings regarding compensation or the existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III., of the Workmen's Compensation Act, and the general provisions of said act and amendments.

The committee further finds that there is due \$24.50 for reasonable medical services furnished to the employee during the first two weeks after the injury.

DAVID T. DICKINSON.

ARTHUR F. KEEFE.

ADDISON M. GOLDSMITH.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties in the Hearing Room, New Albion Building, Boston, Mass., Thursday, Feb. 19, 1914, at 10 A.M.

Mr. Albert E. Wiswall of the Houghton Heel and Leather Company, an employer of the claimant since the injury he received in his former employment, testified as to the earnings of the claimant from about the middle of November, 1913, to the middle of February, 1914. It appeared from the evidence introduced that the average weekly earnings of the claimant after said injury in his former employment were \$9, and the Board so finds. His average weekly wages at the time of the injury in the express business were \$13, and the claimant has been reduced in his grade of employment by reason of the incapacity for his former occupation of expressman, with the result that the difference between his average weekly earnings before and since the injury is \$4.

His incapacity for his former occupation, which was caused by the injury, is an entirely stiff finger, which is in the way of the other fingers, and which has rendered two phalanges permanently useless.

The Board finds that the claimant is entitled to a weekly compensation of \$2 for his partial incapacity, being one-half the difference between his former and present average weekly earnings as aforesaid, and to continue during said partial incapacity; that said compensation for partial incapacity shall be paid from Feb. 19, 1914, the date of this hearing; and that there is also due the claimant an additional compensation of \$6.50 a week for a period of twelve weeks from the date of the injury, \$78, by reason of said finger having been rendered permanently incapable of use.

The Board finds that by a simple operation said finger can be removed, so that his former capacity for work in the express business will be restored, and that it is reasonable that he undergo such operation; and that upon a request being made upon him by the insurer he have this operation. His compensation for partial incapacity shall cease if he fails to have it performed within a reasonable time thereafter.

This decision and all findings regarding compensation or the existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III. of the Workmen's Compensation Act, and the general provisions of said act and its amendments.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 558.

LOUISA COTTAM, *Employee*.

STAFFORD MILLS, *Employer*.

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, *Insurer*.

EMPLOYEE IS INCAPACITATED FOR WORK BY REASON OF NEUROSIS DUE TO PERSONAL INJURY, AND IS ENTITLED TO COMPENSATION.

This employee had been incapacitated for work by reason of a personal injury arising out of and in the course of her employment, and compensation was paid for a certain period of time. The impartial physician appointed by the Board informed the committee of arbitration that the employee was "a fakir, whether intentionally or otherwise," and that she was evidently in good physical condition.

Held, that she was not entitled to further compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board finds and decides, upon new and material evidence, that the employee is incapacitated by reason of a condition of neurosis, due to the injury, and is entitled to compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Louisa Cottam v. American Mutual Liability Insurance Company, this being case No. 558 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Joseph A. Parks, chairman, representing the Industrial Accident Board, James Tansy, Second Street, Fall River, representing the employee, and Fernald Hanson, Esq., Fall River, Mass., representing the insurer, heard the parties and their witnesses in the Committee Room, No. 35, City Hall, Fall River, Mass., Friday, Dec. 19, 1913, at 1.30 P.M.

The insurer terminated the payment of the weekly compensation in this case at the expiration of the fourth week after the injury, on the ground that no incapacity for work existed at that time. Shortly afterwards the employee was requested to report at the hospital, and after five or six weeks' delay she was examined by Dr. Thomas Almy. Upon receipt of his report the insurer offered to pay her to date of his examination, but this offer was refused.

Dr. Thomas Almy testified that he examined the employee on Nov. 3, 1913, and found that she had been injured by a flying shuttle, the said shuttle striking her on the breast and arm. At the time of the examination she had partial motion of the elbow and shoulder, and he could find no evidence of any disability so far as the use of the arm was concerned. The injured employee claimed that she had difficulty in using arm, but he expressed the opinion at that time that the muscles and movements would improve and be benefited by use. In his opinion her disability was purely in thinking that she could not use the arm.

Dr. John B. Trainor, who examined the employee on Nov. 22, 1913, as the impartial physician appointed by the Industrial Accident Board, testified that he found a perfectly normal arm, and there were no objective signs of any injury, except that she expressed the view that it became tired very easily.

It takes considerable time after an injury before confidence is restored. If she had a tired joint it would be a handicap, but he could not find any evidence of this. Her arm would improve daily by use, as she became accustomed to her work. He expressed the opinion that it would tire her and perhaps give some pain, but still she could work. There is no scar or stiffness of the joints and she can make all the normal movements.

Mrs. Louisa Cottam, the injured employee, testified that at the time of the injury she was a weaver in the Stafford Mills, and that if she were well now she would go back to work. A representative of the insurer had offered to pay her a total of eight weeks' compensation in all. Her average weekly wages were \$9.

James Whitehead, secretary of the Weavers' Union, testified as to his part in assisting Mrs. Cottam to obtain compensation and his advice to her, upon her statement that she was not well, to decline to accept compensation for a limited time.

Dr. John Westall testified as to the facts of the injury, and that he found a slight discoloration of the breast on the left side. The more important injury was that to the left arm, about $2\frac{1}{2}$ to 3 inches below the elbow in the external part over the flexor muscles, slightly to the left. He believed there was an injury to one or two nerves, but improvement had been gradual, the swelling diminishing regularly until it disappeared altogether. There were then no visible signs of the injury, but the injury to the nerves gave her a tired feeling. He expressed the opinion that he did not think she could perform the duties required of her in the weaving room of the mill. He suggested an examination by a neurologist, and believed that some slight deficiency in the nerve action would be found. She is unable to do work which she would have to do in the mill. Use would help arm.

The employee was referred by agreement to Dr. Daniel J. Fennelly, a neurologist, as the impartial physician appointed by the Board under the authority of section 8, Part III., of the act, and his report follows: —

P. E. W. D. and N. — Pupil, normal. Tongue, central normal, upper extremities normal; no marks or scars to be seen from the injury; left grasp slightly weaker than right, which patient makes more pronounced

during testing. Sensation in all parts of body normal, including left arm. Reflexes in lower extremities normal and equal. Heart slightly enlarged, neutral regurg murmur heard at apex, trans. axilla (old lesion) of no account at present.

Diagnosis: Neutral regurg, otherwise neg.

Summary: This patient is a fakir whether intentionally or otherwise, as she is evidently in good physical condition at present but for the cardiac trouble, which does not even give her shortness of breath.

Upon all the evidence the committee of arbitration finds that the employee, Louisa Cottam, received a personal injury, arising out of and in the course of her employment, on Tuesday, Aug. 26, 1913, and that all incapacity for work as a result of said personal injury ceased on Nov. 22, 1913, the date of the examination made by Dr. John B. Trainor, the impartial physician appointed by the Board; and the committee finds that there is due the employee a total sum of \$48.21, this being ten and five-sevenths weeks' compensation at \$4.50 per week, covering the time from Sept. 9, 1913, to Nov. 22, 1913, inclusive, less any payments already made by the insurer to said employee.

JOSEPH A. PARKS.

FERNALD L. HANSON.

JAMES TANSY.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the case as an entirely new matter, at Room 35, City Hall, Fall River, Mass., on Saturday, March 7, 1914, at 10.30 A.M., and finds and decides as follows:—

The findings of the committee of arbitration which heard the case originally were fully justified on the evidence before it, the reports filed by Drs. John B. Trainor and Daniel J. Fennelly showing that all incapacity for work ended on Nov. 22, 1913, to which date compensation was allowed.

New and material evidence was presented to the Board, on review, in addition to that presented before the committee of arbitration, Dr. John W. Coughlin, who examined her, testifying that while she is thirty-five years old she has the mentality of a child of fifteen. Not having seen her before the injury he

does not know whether this mental deficiency existed prior to that time or not. In her testimony the employee appeared garrulous, incoherent and of almost incredible obstinacy. For example, it was established beyond doubt that the accident occurred on Aug. 26, 1913. Yet although it was repeatedly pointed out to her that this could not be true, she persisted in reiterating that it happened on Sept. 9, 1913, declaring that she was right as to the date and all the other witnesses wrong. Dr. John Westall, her attending physician, testified that since the injury she told him and others a circumstantial account of having some substance blown into her ear which caused swellings and eruptions, but that there appeared to be no basis for the story. On another occasion she went to Dr. Westall and told him a clearly imaginary story of having all the bones in her back and shoulders put out of place. The employee accused Dr. Daniel J. Fennelly, the expert impartial physician who examined her for the Board, of having made an inadequate examination. She claimed he did not examine the injured left arm at all. The physician explained that he used an instrument on the right arm to get the blood pressure, and had made a careful examination of the injured arm. The employee claimed that on certain days she was unable to use the right arm on account of pain due to the injury to the left arm. She was not able to resume work because of the incapacity due to the injury. Drs. Coughlin and Westall also testified that she was not able to resume work on account of neurosis, following the injury. Drs. Fennelly and Trainor said there were no objective signs of the injury, the former agreeing that neurosis was not uncommon in a case like this, considering the peculiar mental characteristics of the employee. Dr. Fennelly stated that he believed the employee "has unconsciously made herself believe that there is something the matter with that arm and cannot do things with it." The employee testified as to her relations with the representative of the insurer, Mr. Orton A. Peck, who she said first paid her two weeks' compensation and then after an interval of four weeks offered her a total of eight weeks' compensation if she would sign a settlement receipt. She declined the offer because she was unable to resume work. She said she was not now able to resume work.

Dr. John W. Courtney, the impartial nerve specialist named by the Board to examine her, reported in substance that he made a complete examination and covered the entire nervous system. "As a result thereof I have to report to you that I found no evidence of any tangible injury anywhere. The condition in the left arm is what we term a neurosis, *i.e.*, a state of local irritability of certain nerves. Into this condition the mental factor largely enters, and so long as the patient believes in the local disability, just so long does this disability exist in fact. Hence, in the case in hand I advise giving the patient several weeks' more rest. My reason for so advising is that the patient is slowly relinquishing the idea that something serious is the matter with her arm, and that it will take the length of time suggested above to entirely eradicate the fear of disease from her mind. If one attempts to force her to the conviction that the arm is all right even now, the result will be a postponement of recovery for many months."

In this case, the only test seems to be whether the Industrial Accident Board believes, admitting that there is no physical impairment to the arm as a result of the injury, whether or not this employee is malingering, or whether she is suffering from a nervous mental or hysterical effect of the injury, in which latter case the employee's right to compensation should not cease.

The Board appreciates that a favorable decision to the said employee may be alleged to be a precedent which would subsequently open the door to malingerers who, if they would claim with sufficient pertinacity that a serious mental effect remained as a consequence of a physical injury, would be entitled to compensation. The decision of the Board in this case is made, however, with the distinct understanding that it shall not constitute a precedent, for the reason that the Board finds as a fact that a great deal of the employee's mental attitude can be traced to the lack of sympathy on the part of the Fall River representative of the American Mutual Liability Insurance Company; and the Board further believes if the insurer or its agent had shown ordinary tact and sympathy in this case it would probably have been closed and the employee been at work many weeks ago. There is a real responsibility

resting on insurance companies, in common with all other persons interested in the act, to work against the evil of malingering, and these cases should be so conducted in the settlements as to give no ground for the mental attitude of persecution which is shown here.

Upon all the evidence the Board finds that the employee is a woman of subnormal mental capacity, who is now incapacitated for work as the result of a condition of neurosis that is due to the injury, and she is apparently convinced that she cannot work and continues to be so convinced notwithstanding the fact that there is no evidence of any tangible injury anywhere. The mental, nervous or hysterical effects of an accident, such as this employee sustained, are just as much a "personal injury" as are the physical effects. (*Eaves v. Blaenclydach Colliery Co., Ltd.*, 2 B. W. C. C. 329; *Pugh v. London, Brighton and South Coast Ry. Co.*, 2 Q. B. 248; *Yates v. South Kirby, etc., Collieries*, 3 B. W. C. C. 418.)

The Board finds that Louisa Cottam, the said employee, received a personal injury arising out of and in the course of her employment on Aug. 26, 1913, and that she is now totally incapacitated for work by reason of a condition of neurosis following said injury, said total incapacity continuing; and following the recommendation of the expert impartial specialist, the Board awards a weekly compensation of \$4.50 from Sept. 9, 1913, the fifteenth day after the injury, to April 15, 1914, a total of \$140.14, less compensation for two weeks already paid by said insurer to said employee, making the sum of \$131.14 due, all compensation to cease on April 15, 1914.

DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 559.

WILLIAM T. SULLIVAN, *Employee.*

STRATHMORE PAPER COMPANY, *Employer.*

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, *Insurer.*

SUPREME JUDICIAL COURT DECIDES THAT EMPLOYEE WHO DILIGENTLY ENDEAVORS TO SECURE EMPLOYMENT AND FAILS TO OBTAIN SAME BECAUSE OF INCAPACITY DUE TO THE INJURY IS ENTITLED TO COMPENSATION ON THE BASIS OF TOTAL INCAPACITY FOR WORK.

The employee lost his arm by reason of a personal injury arising out of and in the course of his employment. For a period of five months, from May 31, 1913, to Oct. 25, 1913, he did not work. He diligently endeavored to secure employment, and was unable to secure same because of the loss of his arm. The employee obtained a position as watchman on Oct. 26, 1913, and has since earned an average weekly wage of \$15. The evidence showed that on May 31, 1913, he was capable of performing the work which he finally procured, or any work which a one-armed man could ordinarily perform.

Held, that the employee was totally incapacitated for work during the period from May 31, 1913, to Oct. 25, 1913.

Review before Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to Supreme Judicial Court.

Decision. — The Supreme Judicial Court affirms the findings of the Industrial Accident Board.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of William T. Sullivan v. American Mutual Liability Insurance Company, this being case No. 559 on the files of the Industrial Accident Board, reports as follows: —

The arbitration committee, consisting of James B. Carroll, chairman, representing the Industrial Accident Board, W. J. LaFrancis, representing the employee, and Harry R. Elder, representing the insurer, heard the parties at the Auditor's Room, Court House, Springfield, Mass., Monday, Dec. 1, 1913, at 9.30 A.M.

John Morrison, Esq., represented the insurance company.

It was agreed in this case that the balance of the fifty weeks' specific compensation for the loss of his arm is to be paid him

by the insurance company, and it is agreed that beginning on October 26, when he went to work at \$15 a week, he is entitled to one-half the difference between \$15 and \$20.67, *i.e.*, \$2.84 a week, to be continued during his partial incapacity for work, in accordance with section 10, Part II., of the act.

The only question for our decision is this: Is he entitled to compensation between the 31st of May and October 26, and if so, at what rate? The insurance company contended that on the thirty-first day of May he was able to go to work, and that his compensation should cease because he was able to go to work, independently of whether he was able to procure work.

The testimony was substantially as follows: —

William T. Sullivan, living at 68 Park Street, Springfield, testified as follows: —

On February 7, while in the employ of the Strathmore Paper Company, I met with my accident. This accident necessitated the amputation of my right arm, which took place the same day I was hurt. I was treated by Drs. Downey and Sweet. Neither of these doctors is my family physician, but I took the ones that were nearest to hand. They dressed my arm, examined it, talked it over with me and told me to call again if it bothered me. It did bother me, and so I called again, and up to September I expected another operation. Dr. Sweet says it may take weeks and it may take months to take the pain out of my arm, and then it will be time to operate again. The last time Dr. Sweet saw me was along in September some time. The pain in my arm is just as severe to-day as it was two days after the amputation, the only difference is I was under morphine then. The morphine treatment continued about three weeks. Dr. Sweet is a surgeon and Dr. Downey is a medical doctor, but Dr. Sweet took as much care of me as Dr. Downey did. Dr. Sweet saw me every day for over six weeks, and after that perhaps two or three times a month. Dr. Downey was attending me for my nerves. When I left the hospital I was in a very poor condition mentally. Dr. Downey saw me in May, and he told me that he thought it would be good for me if I could get something to do. I was told when I went to the Strathmore Paper Company that as soon as the new mill was completed they would give me a position. This was along the latter part of May. At the time this was suggested I told them that I was in no condition to go to work, neither mentally nor physically. I was living at Springfield and this position was in Woronoco.

When the position was offered me I told them I would think the matter over and call later. About the latter part of May I went back and they told me the job still remained the same and they would let me know. The doctor told me at that time that he thought I would be able to try and I would have tried it if I could have gotten a position. I have looked

for work and other people have looked for it for me. I would have taken any kind of a job that I thought I could do. From the last of May I started to look for work, but at that time I really was not able to work and am not now. The position spoken of in May did not present itself until the twenty-sixth day of October. This position is that of a night watchman in the new mill. Very often I called to see about this position, but the answer was always that as soon as the mill was completed I would be put to work.

The following letter from Dr. Downey, one of the attending physicians, was introduced at this time: —

To the American Mutual Liability Insurance Company.

Your letter written to Dr. Sweet and served to me, and would say in reply, that in my opinion Mr. Sullivan was physically able to resume such employment that a one-armed man could be capable of doing as early as June 1, or at least by the 15th of June, and so advised him at that time, thinking employment would relieve his mental excitement and nervous condition.

DR. H. A. DOWNEY.

Nov. 12, 1913.

The committee of arbitration finds that from May 31, 1913, to Oct. 25, 1913, inclusive, the employee did not work, and that he diligently endeavored to procure employment, but was unable to obtain work because of the loss of his arm; and we further find that on May 31, 1913, he was capable of performing the work which he finally procured, or any work which a one-armed man could ordinarily perform.

We therefore find that he was in fact unable to obtain any work at which he could earn wages during the period from May 31, 1913, to Oct. 25, 1913, inclusive, and that he is entitled to compensation, in accordance with the provisions of the act, at the rate of \$10 a week, amounting to \$211.43.

This decision and all findings regarding compensation or the existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III., of the Workmen's Compensation Act, and the general provisions of said act and its amendments.

JAMES B. CARROLL.
W. J. LAFRANCIS.
HARRY R. ELDER.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, Pemberton Building, Boston, Mass., on Friday, Jan. 2, 1914, at 10 A.M., and affirms and adopts the findings of the committee of arbitration.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

Decree of Supreme Judicial Court on Appeal.

SHELDON, J. This employee sustained an injury which necessitated the amputation of his right arm, and for which it is admitted that he was entitled to compensation. But the insurer contends that on May 31 following the accident he was physically able to go to work, and that for this reason his right to be compensated for an incapacity for work ceased on that day, regardless of the question whether he was or was not able to procure work. The facts found by the committee of arbitration, and on review by the Industrial Accident Board, are that from May 31 to October 25 he did not work; that he diligently endeavored to secure employment and was unable to obtain work because of the loss of his arm; but that on May 31 he was capable of doing the work which he finally procured, or any work which a one-armed man could ordinarily perform. Upon these facts, and as an inference therefrom, it further was found that he was in fact unable to obtain any work at which he could earn wages during the period from May 31 to October 25; and he was awarded compensation for total incapacity for work during that time.

Our statute provides for a weekly compensation while "the incapacity for work resulting from the injury is total." (St. 1911, c. 751, Part II., § 9.) The expression "incapacity for work" was taken from the English Workmen's Compensation Act of 1906, in which it was provided that the amount of compensation to be paid "where total or partial incapacity for

work" resulted from the injury should be certain weekly payments. Accordingly, decisions of the English courts fixing the meaning there to be given to these words are of weight. (McNicol's Case, 215 Mass. 499, 501.)

The same words were used in an earlier English statute; and it was held by the Court of Appeal in *Clark v. Gas Light and Coke Co.*, 21 T. L. R. 184, that the object of the act was to give compensation for an inability to earn wages, and that if an injured employee, after repeated efforts, could not get an opportunity to earn wages, a finding that his earning power was gone and therefore that he was under an "incapacity for work" was warranted, although he had a physical capacity to work and earn money. The same principle has been affirmed in other English decisions: that an inability to obtain work resulting directly from a personal injury is an incapacity for work within the meaning of this act, although a like inability resulting from some other cause, such as an altered condition of the labor market, would not be so. The inability to get work is evidence tending to show an incapacity for work, although it will not always be conclusive. (*Radcliffe v. Pacific Steam Navigation Co.* (1910), 1 K. B. 865; *Cardiff v. Hall*, 4 B. W. C. C. 159 (1911), 1 K. B. 1009; *Brown v. J. I. Thornycroft & Co., Ltd.*, 5 B. W. C. C. 386.)

This doctrine of the English courts was settled finally in two decisions of the House of Lords. (*Ball v. William Hunt & Sons, Ltd.*, 5 B. W. C. C. 459, overruling same case in the Court of Appeal (1911), 1 K. B. 1048; and *MacDonald v. Wilson's & Clyde Coal Co.*, 5 B. W. C. C. 478.)

In our opinion these decisions are correct in principle. The object of our statute was to give compensation for a total or partial loss of the capacity to earn wages. (Gillen's Case, 215 Mass. 96, 99.) If, as in this case, the injured employee, by reason of his injury, is unable, in spite of diligent efforts, to obtain employment, it would be an abuse of language to say that he was still able to earn money, — that he still had a capacity for work, even though his physical powers might be such as to enable him to do some kinds of work if practically the labor market were not thus closed to him. He has become unable to earn anything; he has lost his capacity to work for

wages and to support himself; not by reason of any change in the market conditions, but because of a defect which is personal to himself, and which is the direct result of the injury that he has sustained. He is deprived of the benefit which the statute promises to him if he is told that because he could do some work if he could get it he is not under an incapacity for work, although by reason of his injury he can obtain no opportunity to work. But we said in *Donovan's Case*, 217 Mass. 76, that the statute was to be construed broadly for the purpose of carrying out its manifest purpose.

The Industrial Accident Board had a right to find that this employee was totally incapacitated for work until October 25, and to award him compensation upon that basis. The decree of the Superior Court must be

Affirmed.

CASE No. 562.

MARY FLANAGAN, *Employee*.

CHACE MILLS, *Employer*.

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, *Insurer*.

E. A. MCCARTHY, M.D., *Physician*.

**WHEN INSURER DOES NOT FURNISH MEDICAL ATTENDANCE IT
MUST PAY A REASONABLE FEE FOR THE SERVICES OF
PHYSICIAN ENGAGED BY EMPLOYEE.**

The employee received a serious injury, and no attempt was made on the part of either the insurer or employer to "furnish" medical attendance of any kind, the employee being sent home in a carriage furnished by the employer, and nothing being said to her about medical attendance. Upon her arrival home she sent for the physician, a specialist in injuries such as she had sustained. He gave her skillful and helpful treatment and presented a reasonable bill for the services rendered.

Held, that the insurer did not furnish medical attendance, as required by the act, and that the bill of the physician should be paid.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Mary Flanagan v.

American Mutual Liability Insurance Company, this being case No. 562 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Joseph A. Parks, representing the Industrial Accident Board, chairman, John W. Coughlin, M.D., 399 North Main Street, Fall River, representing the employee, and Spencer Borden, Fall River, Mass., representing the insurer, heard the parties and their witnesses in the Committee Room, No. 35, City Hall, Fall River, Mass., Friday, Dec. 19, 1913, at 10 A.M.

The sole question in dispute was the bill of the physician, the employee having filed a request for a hearing before a committee of arbitration in which she stated the cause of the disagreement to be the failure of the insurer to "pay Dr. Eugene A. McCarthy for services rendered me during the first two weeks after the injury, and for the payment of which I am liable, in amount \$41."

There was no disagreement as to the date of the injury, which was April 17, 1913, nor was there any dispute as to the said injury being covered under the Workmen's Compensation Act. The insurer, through its attorney, Orton A. Peck, Esq., entered an objection to the proceedings, claiming that the committee had no jurisdiction. The objection is therefore noted in the record. The said attorney for the insurer was afterwards given the right to cross-examine witnesses and present any evidence that he desired, without prejudice to his right to take up the objection recorded as to the jurisdiction of the committee of arbitration.

Mary Flanagan, the injured employee, testified that she received a personal injury arising out of and in the course of her employment on the morning of April 17, 1913, her hip being fractured by reason of a fall on the floor. She was sent to her home in a vehicle provided by the mill officials, but no proffer of medical or hospital services was made, and not being able to read she had no knowledge of any printed notice advising employees that such attendance could be obtained at the Union Hospital. She had no personal knowledge that any employee had ever received treatment at the Union Hospital for an injury occurring in the mill. She sent for Dr. Eugene A. Mc-

Carthy shortly after her arrival home, and received treatment from him in accordance with an itemized bill which was offered in evidence. On April 18, 1913, the doctor sent her to the Union Hospital for the purpose of having an X-ray taken, and she went expressly on the condition that she would not be compelled to remain there. An ambulance took her from her home to the hospital and back again. She considered herself legally liable for the bill of the physician, and asked that the insurer pay her the amount due the doctor for services rendered during the first two weeks after the injury. The insurer had not furnished medical attendance at any time during her injury, but had written her from New Bedford, under date of April 25, 1913, as follows: "We have a report of your injury at the Chace Mills on April 17, 1913. We would say that you may be treated free of cost to you during the first two weeks after your injury at the Union Hospital, Fall River. We cannot pay your own doctor."

Dr. Eugene A. McCarthy testified that he was a specialist in the treatment of bone diseases in the orthopedic department of the Union Hospital. He gave Mary Flanagan special first-aid attention on April 17, charging \$5 therefor, and made 12 other visits during the first two weeks after the injury, to wit, on April 17, 1913, 18, 19, 20, 21, 22, 23, 24, 25, 27, 29 and 30, charging \$3 per visit, all of these visits being required. His regular charge to those who could afford to pay was ordinarily \$5 per visit, but he understood that cases under the Workmen's Compensation Act were to be treated on an industrial basis, and he charged only \$3 per visit. The serious nature of the injury may be more readily understood when it is known that the physician continued treatment since April 30, 1913, and the patient is still under his care.

Dr. Thomas F. Gunning testified as to the reasonableness of the physician's fee.

The committee of arbitration finds upon this evidence that the employee, Mary Flanagan, was not furnished medical or hospital services within the meaning of section 5, Part II., of the act at the time of the injury nor at any time thereafter. The posting of a notice in the mill did not "furnish" medical

attendance, nor can it be said that the letter dated April 25, 1913, "furnished" medical attendance to the employee.

The employee had received what was admittedly a serious injury, — an injury so serious that she is now totally incapacitated for work thereby, although eight months have elapsed since its occurrence. No attempt was made on the part of either the insurer or employer to "furnish" medical attendance of any kind, the employee being sent home in a carriage furnished by the employer, and nothing being said to her about medical attendance. Upon her arrival home she sent for the physician, a specialist in injuries such as she suffered from. He gave her skillful and helpful treatment and presented a reasonable bill for the services rendered. She is legally liable to the physician for its payment, and the insurer is in turn liable, under the act, to the employee for the payment of the bill in the full sum as rendered.

The committee of arbitration therefore finds that the insurer did not furnish medical services to the employee within the meaning of section 5, Part II., of the act, and finds that there is due Mary Flanagan, the said employee, the sum of \$41 for medical services rendered by Eugene A. McCarthy, M.D., during the first two weeks after the injury, to wit, from April 17, 1913, to April 30, 1913, inclusive.

JOSEPH A. PARKS.
JNO. W. COUGHLIN.
SPENCER BORDEN.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, New Albion Building, Boston, Mass., on Thursday, Jan. 22, 1914, at 10.30 A.M., and affirms and adopts the findings of the committee of arbitration.

The main question involved in this case is the right of an employee to obtain necessary and reasonable medical attention when the insurer has neglected to furnish such attendance, as required by section 5, Part II., of the act, and the further right

of an employee to be reasonably compensated for the amount expended or the liability incurred for said attendance.

- The insurer also raised the question of the jurisdiction, first, of the committee of arbitration, and second, of the Industrial Accident Board, on the ground that there was no dispute between the parties as to the payment of compensation.

The Board rules that the furnishing of medical services during the first two weeks after the injury, being the only benefit received during the said first two weeks after the injury, may properly be regarded as compensation, being the equivalent thereof, and if the parties fail to agree as to the payment of a reasonable fee for medical services necessarily rendered during the said period, the matter is properly before a committee of arbitration in the first instance, and, on review, before the Industrial Accident Board.

The evidence shows that the employee's hip was fractured by reason of a fall on the floor of the mill in which she was employed, and that she was sent to her home in a vehicle provided by the mill officials, no proffer of medical or hospital services being made to her until nine days after the injury. She was not able to read or write, and had no knowledge of the information contained in a printed notice posted at her place of employment, that medical attendance could be obtained at the Union Hospital, nor had she any personal knowledge that any employee had ever received treatment at said hospital for an injury received in the mill. The mill authorities were aware of her serious condition at the time of the injury and did not send her to the Union Hospital for treatment. Upon her arrival home she sent for a competent physician, who rendered skillful and helpful treatment, presenting a reasonable bill to the employee for the services rendered.

Section 5, Part II., of the act provides that "during the first two weeks after the injury the association shall furnish reasonable medical and hospital services, and medicines when they are needed." The insurer, being required under said section to furnish reasonable medical services and not having furnished them, the employee is entitled to the payment of compensation covering the fee of the physician engaged by her to a reasonable amount.

The Industrial Accident Board finds upon all the evidence that the insurer did not furnish medical services to the employee; that the bill of \$41 for medical services by Eugene A. McCarthy, M.D., is a reasonable and proper fee for all services rendered during the first two weeks after the injury, and that there is due from the insurer to the said employee, Mary Flanagan, the sum of \$41 on account of medical services furnished by said physician.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 565.

ELLEN V. SPONATSKI, WIDOW OF CHARLES J. SPONATSKI, *Employee*.

LUNDIN STEEL CASTING COMPANY, *Employer*.

STANDARD ACCIDENT INSURANCE COMPANY, *Insurer*.

INSANITY AND SUICIDE HAVING CAUSAL RELATION TO INJURY
WHICH RESULTS IN LOSS OF VISION A PERSONAL INJURY
ARISING OUT OF AND IN THE COURSE OF THE EMPLOY-
MENT. INSURER APPEALS CASE TO SUPREME JUDICIAL
COURT.

The employee received a personal injury by reason of the spattering of molten lead into his eye, causing total loss of vision in said eye. Nearly a month later, as the result of a fit of insanity which the weight of the evidence showed had a causal connection with the injury, he threw himself from the window of the hospital in which he was being treated and received injuries which caused his death.

Held, that the death of the employee by suicide followed a fit of insanity having causal relation to the personal injury, and that the widow was entitled to compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to Supreme Judicial Court.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Ellen V. Sponatski,

widow of Charles J. Sponatski, *v.* Standard Accident Insurance Company, this being case No. 565 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Dudley M. Holman of the Industrial Accident Board, chairman, Edward C. Creed, Esq., representing the widow, and Philip Mansfield, Esq., representing the insurer, heard the parties and their witnesses in the Hearing Room of the Industrial Accident Board, 201 Pemberton Building, Boston, Mass., on Monday, Dec. 15, 1913, at 10 A.M., and at the offices of Messrs. Dickson & Knowles, 53 State Street, Boston, Mass., on Tuesday, Dec. 16, 1913, at 2.30 P.M.¹

We find, therefore, that the deceased Sponatski while working for his employer met with an accident on Wednesday, Sept. 17, 1913, by the spattering of molten lead from a mold into his eye. It occurred in the employer's factory, and arose out of and in the course of the employment of the employee. The average weekly wage of the employee was \$18.66. Ellen Sponatski, who is the widow of the employee, was living with her husband at the time of the accident and was dependent upon him for support.

We find and decide as a fact that the accident injured the eyesight of the deceased, caused the loss of his eye, caused nervous and mental derangement, caused insane hallucinations and caused him, while mentally deranged, in a state of insanity and under the influence of hallucination, by an irresistible impulse, to commit suicide, and that the accident was the sole, direct and proximate cause of the suicide.

We make these findings of fact. They are fully supported by the evidence and expert opinions, and no other conclusion of fact seems possible.

In regard to the defendant's requests for rulings in requests numbers 1, 2, 3, 4 and 11, the requests seem to state the correct principles of law, but upon properly applying the principles involved to the evidence, we find upon the facts against the defendant or employer, and in favor of the claimant for compensation. In regard to all the other requests, our finding

¹ The evidence heard by the committee of arbitration is reported in all its material aspects by the Industrial Accident Board, and will be found in the pages which follow the findings and decision of said board on review.

upon the facts is contrary to the finding urged by the counsel for the employer, and is in favor of the claimant for compensation.¹

There is no dispute open in regard to the principles of law involved, as this decision is reached upon a finding that the facts are opposed to the claims urged by the employer and insurer.

We find, therefore, that the claimant is entitled to recover full compensation for the death of her husband, upon whom she was dependent, as provided by the Workmen's Compensation Act, and that she is entitled to recover \$9.33 a week for a period of three hundred weeks, making a total of \$2,799, from the insurance company.

DUDLEY M. HOLMAN.

EDWARD C. CREED.

Dissenting Opinion.

I am obliged to dissent in this case, because I feel that I am bound by *Daniels v. New York, etc., Railroad*, 183 Mass. 393. I am of the opinion that there is no liability for a death by suicide under the act, unless the death is the result of an uncontrollable impulse, or is accomplished in delirium or frenzy, caused by the accident. It is very plain to me that the deceased in this case contemplated suicide, because he wrote a letter which is inconsistent with any other thing. I am also of the opinion that the deceased was mentally unbalanced, and were it not for the *Daniels* case I should find in favor of the widow. But until the courts have held that the rule laid down in that adjudicated case is not applicable in a matter of this kind, I feel bound by it.

PHILIP MANSFIELD.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Board heard the parties at the Hearing Room, New Albion Building, Boston, Mass., on Thursday, Sept. 17, 1914, at 10.45 A.M., and affirms and adopts the findings of the committee of arbitration.

¹ See findings and decision of Industrial Accident Board.

The employee was represented by J. J. Mansfield, Esq. The insurer was represented by Dickson & Knowles, Esqs.

On Sept. 17, 1913, about 10.30 A.M., Charles J. Sponatski, employee, was injured when some molten lead spattered into his eye, affecting the same so that he lost the sight thereof.

He was taken to the Massachusetts Eye and Ear Infirmary.

On the morning of Oct. 13, 1913, while insane, as a result of his injury, he threw himself from a window and was fatally injured, death resulting two days thereafter. The question at issue is: "Can the dependents of an employee who is injured, and kills himself while insane, the insanity being the direct result of the injury, recover compensation under the Workmen's Compensation Act?"

From the expert testimony in the case, the testimony of the nurses, and the evidence of his wife and members of his family, we find that when he threw himself from the window he was insane. We further find, upon all the evidence in the case, that this insanity was brought about and resulted from the injury which he received while in the employ of the Lundin Steel Casting Company, on or about Sept. 17, 1913.

After his death a letter, a copy of which is as follows, was found under his pillow: —

my wife folks are not to blame for anything my wife was a pur woman when I married her she be is pure to this day she is not to blame for anything my family is not to blame for anything it is all my own fault (signed Martin Sponatski.)

While there was no direct evidence in the case that this was in his own handwriting, considering all the circumstances, we find that the letter was written by the employee. This is the only evidence that we are able to find in the case tending to show that he contemplated suicide, and there is nothing in the case to show when this letter was written. For some time before the act of suicide he exhibited a complete change in his mental make-up; was moody, disagreeable, thought he was accused of stealing money belonging to another patient, thought that somebody was in the room when nobody was present, and in many ways, by his actions and conduct, indicated that he was insane.

There was no evidence of preparation for the act of suicide; and while the case is very close upon the question of whether or not the death of the deceased resulted from an "uncontrollable impulse and without conscious volition to produce death, or whether the suicide resulted from a moderately intelligent power of choice" (*Daniels v. New York, New Haven & Hartford R.R. Co.*, 183 Mass. 393, page 400), we find that the suicide did result from an "uncontrollable impulse and without conscious volition to produce death." We think, however, that the rule laid down in the *Daniels* case is not the rule to be followed under the Workmen's Compensation Act. In other words, the question is not whether the consequence is a reasonable and probable one, but whether the consequence resulted from the injury.

Dunham v. Clare, 4 Minton-Stenhouse, 102, 66 L. T. 751. In the above case the following language is used by Collins, M. R.: "It does not matter how improbable or unnatural it might have appeared that death should result, the only material question is whether there has been any break in the chain of causation, whether any new act has intervened between the injury by accident and the subsequent death. This act of Parliament has imposed liability to pay compensation quite independent of any question of contract or negligence." And in the case of *Southall v. Cheshire County News Co., Ltd.*, 5 B. W. C. C. 251, it was assumed that if suicide resulted from the injury, the dependents were entitled to recover. It was decided in this case, however, that there was no evidence to show that the man drowned himself while insane, that it was as much likely that it resulted from an accident, and not from suicide. And in the case of *Malone v. Cayzer, Irvine & Co.*, 1 B. W. C. C. 27-45, S. L. R. 351, it was held that if a man lost the sight of one eye and received an injury to the other, and, in consequence, his nervous system broke down and insanity followed and he committed suicide thereof, that on satisfactory proof of such facts the widow would be entitled to recover.

We therefore find that the employee met with an injury on the 13th of September, 1913, which brought about insanity, and while so insane he committed suicide; that the insanity

and suicide resulted from the injury, and that the injury arose out of and in the course of his employment; that he left a widow with whom he lived and who was wholly dependent upon him for her support; and that his average weekly wages were \$18.66. We therefore find that the widow is entitled to recover compensation for the death of her husband at the rate of \$9.33 a week for a period of three hundred weeks.

The insurer requested that all the evidence be reported, and the annexed copy of the testimony was taken before the committee of arbitration, which is all the material evidence in the case.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
JOSEPH A. PARKS.

Testimony before Committee of Arbitration.

It was agreed that the accident to Charles J. Sponatski occurred on Wednesday, Sept. 17, 1913, at 10.30 A.M.; that molten lead splattered from the mold into his eye and affected his eyesight so that he lost the sight of his eye. It occurred in the factory where he was employed, and it was agreed that the accident arose out of and in the course of his employment. The amount of the average weekly wage varied from \$16.52 to \$21, but the insurance company agreed to pay one-half of \$18.66, or \$9.33, which was the amount arrived at as the correct average weekly wage by the auditor of the Standard Accident Insurance Company. This was agreed to by the widow to be fair.

While Sponatski was under treatment at the Massachusetts Eye and Ear Infirmary he threw himself out of a window, receiving injuries which resulted in his death. The insurance company denies liability for the death and claims that it was the action of a despondent man and not the result of insanity. The claimant urges that it was the result of insanity which manifested itself previously to his death, and was the result of an uncontrollable impulse while mentally unbalanced, the mental unbalance being caused by reason of the accident.

It appeared in evidence, on the testimony of John Morely

Flockton, who had known Sponatski for a dozen years or more, that he was a man of a cheerful disposition, and, as compared with the average man, very even disposition, especially in regard to business reverses.

Wanda Anderson, the mother of Charles J. Sponatski, testified that during his life, his boyhood, through his youth and through manhood, he was always happy and industrious and never sick. She saw him first after the accident on the 5th of October at the Massachusetts Eye and Ear Infirmary on Charles Street, Boston, when he told her he was all nerved up and couldn't sleep nights at all. She talked with him about an hour. His actions were not what they used to be. He complained of pain in the region of the eye. He was so nervous that after she got home she told her boy, Walter Anderson, to telephone to the authorities to watch and look out for him. She said there had never been any insanity in the family.

John Skomersky testified that he lived at 36 Heath Street, West Everett, and was an uncle of Charles J. Sponatski. Previous to the accident he saw him as often as once every two months; that he had seen him this way for five or six years and used to live with him in South Boston. He testified that during the time he lived with him he was always happy — not a talker, never had much to say, but was always cheerful. When he called upon him the day before he died, he noticed a change in his appearance and conduct. He told him he had an awful pain in his head and he thought his other eye was affected already. He brought some fruit in his pocket and wanted to give it to him, but Sponatski said, "Don't you pull it out because I am accused of taking \$2 from somebody here, and don't you take it out." It was very difficult to get him to talk, and he had to insist upon his answering. He saw him on Sunday.

Ellen V. Sponatski, living at 114 Boston Street, Dorchester, testified that she is the widow of Charles J. Sponatski. Her family consists of a boy and a girl. Her husband was twenty-eight years and a few months old when he died. They had been married five years, Thanksgiving Day. She had known him eight years. She testified that he was cheerful and happy when she went with him, and when they were married it was

just the same. She had never noticed anything peculiar or unusual about his conduct or talk before the time of the accident. She had never seen him despondent. She saw him eleven times after the accident — every visiting day except Sunday. The first time she saw him was the Thursday after the accident, which occurred on Wednesday. He appeared well and happy. He had no great pain. She remained with him about an hour. She went to see him again on Saturday of that week. He was getting along very nicely. He thought he would be able to see. He complained of pain on the top of his head and said it was on account of his eye. The next visit was on Tuesday of the following week. He said he was going to have lots of trouble. He thought his eye was perforating.

I went to see Dr. Alcosov. I waited for an hour but couldn't find him, so I went home. He was happy — was not despondent. He thought he would be better the next day. His talk was about the eye. I next saw him Thursday of the same week. I had to wait for him. He was down in some room downstairs. He went to get a vision taken. After he came up he didn't want to talk at all for ten minutes. He said, "My troubles are commencing now." He didn't want to talk. He was brooding over the eye leaving him. He made no complaint of pain. There were drippings from his eye on his face. My next visit was on Saturday. He didn't want to say anything at all. He was talking about the eye being gone on him. He said, "Now what am I going to do? The eye is gone. What am I going to do now?" He said, "There is a hole there. Put your hand up."

Q. Was there a hole there? A. No, I didn't see any hole.

The next time I saw him was Tuesday of the following week. He was brooding over the eye and said he couldn't sleep at all. I asked him how the other eye was and he shuddered for a while and then looked at me and said, "It bothers me," and he said, "You look sick." I said, "I am not sick." I said, "Why are you roasting like that? Don't they open the windows in the night?" He said, "Yes, but I can't sleep. I am always perspiring." And then I asked him how his appetite was and he said, "Pretty good." I brought one of the children with me and he didn't want to talk to her at all. I said, "Take her in your lap," and he said, "No, I don't want her in my lap." He had been fond of the child and was in the habit of playing with the child every time I went to the hospital. Before the accident — at home — he was crazy over the children. I next saw him Thursday. He came to the door that day to meet me, and I said, "How are you to-day? Are you better?" He said, "No, it is gone. You can see it is gone." I said, "No, it isn't gone." He said, "Put your hand there again." I wouldn't do it. I was kind of nervous. He said,

"You see yourself that I have no eye." I told him it was only a cloud there and it would come off. He said, "You see I have no eye. What am I going to do now? You see I cannot see you very good now. What am I going to do with no eye?" I said, "The eye will open. It will be all right." I told him the compensation act sent me papers and I told him about the \$9.33 I was going to get. I told him I would bring the papers Saturday and read them to him and tell him about it, and he didn't say yes or no. He was not interested. He just bowed his head. The only thing he spoke about was the eye. He didn't speak about the children and about how I was getting along. He never asked me anything about how I was managing the house. The next time I saw him was Saturday. I brought the papers in the bag and was going to open the bag. He said, "Don't open the wrist bag." I said, "Why not?" He said, "There is a man behind you watching you. I am accused of taking \$2. If they see you opening the bag they will think I am giving it to you." I had brought some stockings and wanted to give them to him, but he said, "Don't take nothing out of the bag." I said, "I will read you the papers and give you the handkerchiefs I brought," but he said, "No, I don't want the handkerchiefs." There was a nurse there, and I said, "He is very discouraged to-day." The nurse just looked at me, and he said, "Don't go to the nurse, stay right here." The little girl wanted to go to the bathroom, and I said "Go and take her," and he said, "Go over yourself and take her." I told him I didn't know where it was, so he took her and I stood in the doorway and looked after them. I was there until he came back with her. I said, "I have some apples in the bag if you would like to have them." He said, "I told you not to open the bag. There is a man behind you." I turned to see if I could see the man, but there was no man there. He had perspiration on him. He looked terrible. He had no shave or nothing, and I said, "Why don't you shave?" He said, "Don't I look all right to you?" and I said, "No," and then I said, "I can't see you Sunday, your brother is coming. I will come Tuesday." He didn't say anything. He always kissed the baby good-by, but he never kissed her that day and he didn't want to move off the chair. He complained of pain in his head. He said he never slept in the hospital since he went there. The only time he slept was one night when he went to bed at half-past 7 and slept until 12, and after that he couldn't sleep, with pain. That was the Saturday before his death. The next time I saw him was when he was dying, on October 13, in the Massachusetts General Hospital.

Q. Was he conscious? A. He looked at me. I said, "What did you do this for?" and he said, "Give me that revolver and I will kill you all." My mother was there and my sister, and he made a movement to get up and that's all he said.

Q. Did you receive any notice from his mother in regard to his condition? A. Yes, his mother sent me a letter saying why didn't I speak in the hospital about taking care of him. That was after the second week — after he lost his sight.

Q. You received a letter from whom? A. I didn't receive a letter. Her son came and said why didn't I go over and tell them and talk to some one at the Eye and Ear Infirmary and have them look after my husband on account of his being so nervous.

When I spoke to the nurse he told me not to dare get up because she would think he was giving me the money. He said, "You are going to get searched in the office." I believed him. I thought it was the truth. He said a deaf and dumb patient lost some money and he was accused of taking it.

A letter was presented to her, and she was asked if it was her husband's handwriting. She said that it looked something like it, but he wrote better than that; that he knew how to spell — the letter was bad writing and spelling.

Q. Does it look like your husband's handwriting? A. No, it doesn't.

She testified that her home relations with her husband were always pleasant.

Following is a copy of the letter above referred to: —

my wife folks are not to blame for anything my wife was a pur woman when I married her she be is pure to this day she is not to blame for anything my family is not to blame for anything it is all my own fault (signed Martin Sponatski.)

In the upper right-hand corner is the word "Sponatski" and some other words not decipherable.

Q. Assuming that this letter was written by your husband, what do you think he meant when he said "my wife's folks are not to blame for anything"? A. If he wrote the note he must have meant that he had no trouble with them.

Q. What did he mean by "my family is not to blame for anything"? A. He had no trouble with his family.

Q. "It is all my fault," what did he mean by that? A. I think, what I imagine is, on account of having no eye and brooding over it like that, he didn't know what he was talking about.

Her attention was called to the signature and she did not positively identify it as his signature. There was no revolver on the shelf in the Massachusetts General Hospital and there was no shelf. She testified that he did not recognize her readily. He kept staring at her with one eye. Asked if he knew who she was, she testified: —

I imagine he did. He had a kind of a smile on him, but I suppose he was dying. And then I said, "Did you have the priest?" He didn't answer me and I asked the nurse and she said yes.

Walter Anderson testified that his mother asked him to telephone to the Eye and Ear Infirmary, and that he told the operator at the switchboard something to the effect that Sponatski was nervous and to watch him, and the operator informed him that she would notify the physician in charge. He telephoned the message during the noon hour, between 12 and 1 o'clock.

Peter Edward Sponatski, brother of Charles J. Sponatski, testified that he was a twin brother, and that up to five years ago he had seen him every day. Since his marriage he saw him about once a week; that his brother's disposition was something like his own — not looking at the shady side of life at all. He seemed cheerful and happy. He had never noticed anything peculiar in his actions and talk before the accident — no delusions about seeing people. He played in the Waltham Watch Company's Band. His brother telephoned to him on the day of the accident and stated that he was at the Eye and Ear Infirmary and asked him to notify his wife. He went to the hospital and tried to get in, but without success. He saw him the following Sunday and then noticed that he was worried. "I asked him if he could see out of his eye and he said, 'No,' he could just see a mist. I told him to close his other eye and shade it with his hand and look at me, and he did and he said, 'I see a sort of shadow. If I can only hold my own I will be all right.' I said, 'What do you mean?' He said, 'If I don't lose the sight of the other eye.' The following Sunday I went to see him again, but then he was worse than the previous Sunday. He told me the doctor said the eye was perforating. I tried to cheer him up. 'If I get out,' he said, 'looks don't go a great ways with people.' I went to New York the following week, and never saw him again. He complained of pain right behind the eye and said he was unable to get any rest." He was shown the letter, and he said, "My brother's handwriting is better than that, and I would not say that it is his." Asked to look at the signature, he said, "No, that is not his handwriting."

Q. What do you make that word out to be, Martin or Charles? A. It looks more like Martin than Charles.

Q. You wouldn't recognize that handwriting? A. No, sir.

Charles G. Dewey, M.D., testified that he received his medical degree at Dartmouth and later was a postgraduate of Harvard Medical School. He has been connected, since 1886 with various insane hospitals in Northampton, Taunton, and two years at the McLean. After that he was at the Boston City Hospital for four years. In 1901, at the death of Dr. Jelley, he associated with Dr. Waterman in the educational departments. He is assistant superintendent at the Boston City Hospital.

Q. You have heard all the evidence? A. I have.

Q. So that without recapitulating the testimony, will you please state whether or not, in your opinion, the suicide was the result of his physical condition as caused by that accident? A. I should think it probable.

Q. And wouldn't that accident be sufficient cause to result as this did result? A. Yes, in my opinion.

Under cross-examination by Mr. Dickson, he testified as follows: —

Q. Just what do you mean by the use of the word probable? That is, what was the probable cause of this man's committing suicide? A. I mean that with the testimony which has been given, there was probably a mental condition developed as a result of the trauma; that he had hallucinations and delusions, and as a result committed suicide.

Q. How do you account for the fact, assuming that this man has been what has been testified previous to the accident, — a man in good physical and good mental condition, who received this injury on the seventeenth day of September; the eye was not removed; he remains in the hospital from the seventeenth day of September to the thirteenth day of October; and assuming that during that time he had made no complaint to the doctors in attendance or to the nurses that he had been suffering from any pain, — would you then say that the accident itself was sufficient cause for this man committing suicide? A. Yes.

Q. What would your reasons be, or what reasons would you give to base that conclusion on? Assuming that this accident happened on September 17; he remained in the hospital up to October 13; the eye was not removed; and assuming he had made no complaints to the doctor in charge or to the nurses, and no opiates and narcotics given to him; and on this morning he jumps from the window, — would you then say that the injury was the sole cause of this man's jumping from the window? A. I don't believe in sole causes.

Q. My question was, was it the sole cause? A. I don't think that we ever have anything where one thing is the sole cause.

Q. Eliminate that you object to the sole cause, take the injury itself, and couple with my statement that he made no complaint to the doctors in charge or to the nurses, no opiates given, — was the injury an inducing cause for him to commit suicide? A. I do not see why it could not be. The fact that he does not speak to the nurses or doesn't complain of pain, doesn't mean anything. I am surprised that he did not, but many a man will cover up his delusions, and they never know until the outburst.

Q. Doctor, when you used the word probable, did you mean any more than this: that you might have several causes as to the cause of this man's death? A. I don't know what you mean by that. That is the most probable as far as the history has been given.

Q. But that would not eliminate other causes? A. No.

Q. You object to the words "sole cause," Doctor. In your experience as an expert have you ever known of a case of a man who had the injury Sponatski had, committing suicide under the condition that Sponatski did? A. I don't think I have ever known of one committing suicide.

Q. On what do you lay the basis of your claim that the injury brought about this accident to this particular man? Would any part of the brain be injured from the injury to his eye? A. I don't know. It might and might not.

Q. But so far as you know there was no injury to the brain? A. So far as I know.

Q. (by J. J. MANSFIELD). Whether or not it is possible for an injury such as has been described here, by the spattering of molten metal in the eye, producing the conditions described here and causing the terrible pain in the head, — the top, side and back of the head, — whether it would indicate some nervous state or some abnormal condition of the brain? A. I think it might.

Q. Would that be sufficient cause for his having delusions and committing suicide — acting in an abnormal way? A. Yes, I think so.

Q. You can separate these cases; there may be a loss of an eye which may cause one effect and the loss of an eye cause another? A. Yes.

Q. (by Mr. HOLMAN). If this man brooded over this injury to his eye and feared that the other eye might become affected, and he gave himself up to those thoughts pretty exclusively, would that bring about a mental disturbance that would result in insanity? A. I think it might.

Q. Would it be a sufficient cause? A. Yes, with the limitations I gave before — all these other factors entering in.

Q. On what particular thing do you base your opinion that it did? A. It is recognized, I think by all authorities on insanity, that traumatism, or operations, even, on the eye, are more frequently followed by mental disturbances than almost any other organ in the body. It is not so uncommon as similar accidents to other parts of the body. That, with the absence of other causes as far as we have access to, renders, in part, my opinion of the most probable cause.

Q. In arriving at that decision you based your idea somewhat on the fact that this man had delusions, as was apparent by his speaking of a man in the room when no man was there? A. Yes.

Q. You didn't include in that the fact that he spoke of a revolver when there was none? Everything that happened after he jumped from the window should be excluded. A. No, I did not include that.

Q. You say that an eye injury or an operation to an eye is more apt to produce mental disturbances than an injury to any other part of the body? A. Yes. I should exclude the head.

Q. A traumatic injury to the eye would be the next exciting cause? A. I think so.

Q. (by Mr. DICKSON). Then any blow might produce insanity? A. Yes.

Q. The same as a concussion? A. Yes.

Q. From what the wife has testified to her husband suffering with these pains and delusions, wouldn't you have expected him to complain to the doctors in charge? A. Yes, I should have expected it.

Q. In your opinion, when he committed suicide, was he sane or insane? A. Judging from the testimony, I think he was insane.

Q. Is there anything in the letter to indicate to you that the mind that framed the letter was that of an insane person? A. Taken by itself, not necessarily.

Q. Coupled with the evidence in the case, is there anything in the letter to indicate that it was framed by an insane person? A. With the testimony that has been given, he probably was insane.

Q. For what reason? A. He hints at things that probably were delusions, but whether they are I don't know.

Q. Leave the letter as it stands: "My wife's folks are not to blame for anything. My wife was a pure woman when I married her. She is pure to this day. She is not to blame for anything." So up to this time he has relieved all blame for this act from his wife's folks and from his wife. That's true, isn't it? A. I presume that's what he has reference to.

Q. Could there be anything else? A. Yes, I should think that could refer to something in the past which has not come out.

Q. Assuming that there is nothing in the past, just from the evidence itself. Then what could you say? He is writing a logical letter, is he not? He relieves two of responsibility, — his wife's family and his wife. "My family is not to blame." So he takes the responsibility of his act from the shoulders of his wife's family, his wife and his family. Then he says, "It is all my fault." Assuming he wrote it Sunday or Monday, is there anything to indicate that he was of unsound mind? A. It is of unsound mind most decidedly.

Q. Why? A. I think he refers to something outside, something that has gone before, or which he thinks has gone before. He wouldn't go to all this to say they were not to blame for his committing suicide. There is something else he has reference to.

Q. So you think from the reading of the letter that it is evidence the man is insane? A. I think so.

Q. (by Mr. J. J. MANSFIELD). Assuming that he was a man of good health, cheerful and happy in his family relations, and he meets with an accident, — molten metal flown in his eye, — and that is the calamity; whether or not, then, it would appear that it was a sane thing to do — saying that he himself was to blame, when the only thing that existed was a terrible accident for which he was not at all to blame, — would you say that that letter indicated insanity? A. Yes.

Q. (by Mr. DICKSON). Assuming this man had received such an accident as had been described, would you form an idea when he would commence to lose his mind or have hallucinations? A. They vary greatly. Sometimes very soon, sometimes several days.

Q. Give me the earliest to the latest time. A. I have known cases — I am thinking now of an operation on the eye, a simple affair, where the mental condition started within twenty-four hours after the operation.

Q. What was the previous history? A. A normal man, rather irritable. Other cases are delayed much longer.

Q. What was the age of this man? A. I think he was somewhere from seventy to eighty.

Q. Have you any case in mind of such a man as this man was, — a powerful fellow of twenty-eight years of age? A. I have not.

Q. (by Mr. HOLMAN). Would age make any particular difference on the effect of a man's mind if he was in good health and possession of his senses before the operation? Would age have any great effect? Would he be as liable to worry as a younger man? Where would you look for the stronger mental effect? A. If anything, on the aged. A man of robust health is, as a rule, more capable of throwing off the results of injury than an older man.

Q. Your opinion in regard to this man's sanity or insanity isn't based upon that letter, is it? A. No.

Q. Excluding the letter altogether, you are still of the opinion that the man was insane? A. Yes, so far as the testimony given here.

Amanda Manning, head nurse at the Massachusetts Eye and Ear Infirmary, testified that she had charge of the floor on which Sponatski was, and that she had charge of it all during the time he was there; that she couldn't remember, because she had 78 patients on the floor, whether or not he made complaint of pain in the head. He had another nurse, whose name is Miss Lenetin.

Q. Did any one ever make any complaint to you that this man was suffering pain? A. I couldn't say.

Q. Did you see him the morning that he jumped out of the window? A. Yes.

Q. Will you tell the board of arbitrators just what you said, if anything, that morning, and just what you saw? A. That morning I was making my first visit to the ward. It was five minutes of 7, and Mr. Sponatski was sitting on the window sill, leaning against the frame, and his feet were up against the other side. The window was open and he was looking out, and I spoke to him and asked him to come down. He turned around and gave me a kind of wild look. I thought he was getting off the window sill. He let one foot down and raised up on the other knee, and at that he got up on the window sill and leaped right out.

Q. When he looked out, were both knees on the window sill? A. I couldn't say for sure. It happened very quick.

Q. Is there anything else you can tell us or is that all? A. That's all.

Q. Did you ever give him any opiates? A. I don't remember.

Q. How near were you to him at the time you saw him sitting in the window? A. I was standing in the door and the ward was as wide as this room.

Q. So you were within 15 or 16 feet of him? A. About that, yes.

Q. Was there a nurse on that ward? A. Yes. Miss Lenetin.

Q. Was she on duty? A. Yes, we made the visits together. She was standing at the door with me.

Q. Was the night nurse in the room at this time? A. No.

Q. He evidently had been there some time? A. I couldn't say.

Q. From the fact that he was sitting up with both feet on the window sill with his back against the frame, it would indicate to you that he hadn't just hopped up there? A. Yes.

Q. He had been left alone some time? A. The night nurse had just left. Miss Lenetin is the day nurse and Miss Duval the night nurse.

Q. (by Mr. J. J. MANSFIELD). When he gave you the wild look he didn't have the expression of a sane man? A. Not at that time.

Q. He looked insane? A. Yes, he had a wild look. He looked as if he was frightened.

Q. Discouraged? A. No. He appeared as if he had just woke up out of a deep thought. Kind of wild.

Q. (by Mr. DICKSON). Did you find the letter, Miss Manning? A. Miss Lenetin found it under his pillow. She brought it to me.

Q. Is this the letter she gave you? A. Yes.

Grace Gertrude Lenetin testified that she was a nurse in the Massachusetts Eye and Ear Infirmary and had charge of ward N on Sept. 17, 1913. She knew Sponatski, and had charge of the ward when he jumped out of the window. She was a day nurse. There were seven beds in that ward. She had three wards under her observation and about fifteen beds. She did not know whether they were all filled.

Q. State in your own way what you observed with reference to Sponatski from the time he came to the hospital to the time he jumped from the window. A. When he first came to the hospital I believed he could see out of his eye, but he said his sight was getting poorer. He was discouraged and quiet, had little to say. There was no reason to think he was insane at all.

Q. What are your hours on duty? A. From 7 in the morning to 8 at night. I saw Sponatski a dozen times a day or more, but talked with him very little. He was quiet and did not have much to say. The first couple of nights he did complain of pain, but he was given a treatment, and the eye was apparently better and the treatment was stopped.

Q. That was on the first two nights? A. When he first came in the hospital. I couldn't say just when.

Q. Did you ever give him any opiates? A. I gave him nothing at all.

Q. Did you hear anything about the loss of \$2 while Sponatski was in ward N under your observation? A. Yes. There was \$2 stolen. Some one of the patients had taken it. There was \$2 taken while Sponatski was in the ward.

Q. Who was it taken from? A. The deaf and dumb boy that was there.

Q. Had you accused Mr. Sponatski of taking it? A. No, sir. We didn't accuse any person, because we couldn't. The matter was not spoken of.

Q. Who found the letter after Sponatski jumped from the window? A. The deaf and dumb boy found it.

Q. Is that the letter that was given you [shows her letter]? A. Yes, the very one.

She testified, under cross-examination by Mr. Mansfield, that she is nineteen years old and had been in the hospital about nine months when Sponatski became a patient. She went there inexperienced; she isn't a nurse; the hospital is not considered a training school; she had had no other training; she did not speak to Sponatski about the loss of the \$2; she couldn't say what nights it was that he complained of pains in his head.

Q. What was the treatment? A. I couldn't say.

Q. Who gave it to him? A. Whatever doctor was on service. The services change.

Q. What is the system there? A. They have a sort of chart on the front of the bed showing the treatment and changes from hour to hour and day to day.

Q. You wouldn't remember what that said? A. No.

Q. From your experience what would you say would be likely to have been given him? What was usually given in such cases? A. I couldn't

say for sure. I am not certain of the treatment. I think he was getting what is called collyrium 18.

Q. Is that a private mark? A. Yes.

Q. And what does it mean? A. It is a preparation of olive oil and cocaine.

Q. And that had an effect on the man, did it not? A. It helped to soothe the pain.

Q. Did it have an immediate effect? A. No. He was getting it for quite a while and then it was stopped, because he said his eye was not paining him. It was given to him every four hours. It soothed the pain.

Q. Did you see him jump out of the window? A. Yes.

Q. How far away were you? A. As far as from the door to the window.

Q. How long before he jumped out? A. Just after Miss Manning spoke to him he hesitated a few minutes; he looked as blank; he was undecided what to do.

Q. Did he have a wild, staring look? A. A very wild, glassy look. He didn't seem to act as though he heard at all — just looked blank.

Q. Just as an insane person might? A. Yes. He had a vacant stare as though he didn't see you — as though he was picturing things he didn't see; things in his imagination. He didn't pay a bit of attention to us at all — just as if we were not there.

Q. Acted frightened? A. Yes.

Katherine Elizabeth Duval testified that she was a night nurse at the Massachusetts Eye and Ear Infirmary on or about October 13. She had been a night nurse for more than two weeks. She had the whole floor under her observation at night. There were between 40 and 45 patients, not counting the nursery. She never gave Sponatski any opiates. He complained of pain the first three or four nights while getting treatment. Three or four times he left a note asking them not to awaken him for his treatment.

Q. Was it the treatment that the other young lady testified to? A. Yes.

Q. And how long a time are you a nurse? A. Seven months.

Q. What did you notice, if anything, as to whether or not Sponatski rested at night? Whether he was sleeping or not sleeping? A. He seemed to sleep very well, with the exception of the first few nights.

Q. When did you give him the medicine? A. At 12 midnight and 4 in the morning.

Q. When did you last see him before he committed suicide? A. That morning between 6.30 and 6.45.

Q. Where was he? A. Sitting on the window sill.

Q. Did he say anything to you or you to him? A. He said nothing. I said, "Look where you are sitting," and I was going to put some medicine in the cabinet.

Q. Did he make reply? A. No, he didn't answer at all — simply smiled.

Q. Had you given him treatment that night? A. No, in the morning.

Q. What time? A. It was between 5.30 and 6.30.

Q. Do you know whether or not he was awake previous to 5.30? A. He had been awake at 4.30 when I went through the wards.

Q. Do you know whether or not he was awake when you went through at 12 o'clock? A. No, he was not awake.

Q. Did you ever say anything to him about the loss of the \$2? A. I didn't know anything at all about it.

Q. What treatment did you give him? A. Collyrium 18.

Q. Was there cocaine in that? A. Yes.

Q. Do you know how much? A. No.

Q. After the cocaine he would go to sleep again for a half hour? A. Yes.

She testified that she had no previous experience in nursing.

Dr. Albert A. Gardner Morse testified that he was practicing physician and surgeon in Boston for twenty years; was connected with the Massachusetts Eye and Ear Infirmary in September, 1913, as visiting surgeon four months out of every year. Sponatski was under his charge. Collyrium 18 was ordered. It is olive oil, a little cocaine and some atropine. The cocaine is diluted with olive oil.

Q. Can you tell from the record just what amount of cocaine was used? A. One-half of 1 per cent. solution of cocaine. That has been the usual treatment for a great many years for these burns.

Q. At any time did he complain of pain in his eye to you? A. I think he did complain of pain in his eye, but it was rather indefinite. I never saw anything to lead me to think that he was insane.

Q. Did you perform an operation on Sponatski's eye? A. There was a little operation performed on the eye by Dr. Walker.

Cross-examined by Mr. J. J. Mansfield and asked what experience he had in the treatment of insane patients, he answered: —

I have had very little except occasionally some patient will go out of his head in the infirmary. In such cases we put them in the strong room or in the strait-jacket and have a special nurse. That is the only experience I have had.

Q. Were one or two drops of collyrium 18 used at each treatment? Was that the quantity ordered by you for this patient? A. We don't order one or two drops. It is understood that they use a reasonable amount of it.

Q. He did complain to you of some pain? A. I think he did at the beginning.

Q. Have you no idea during how long a time altogether that patient was treated? A. It was administered all the time he was there.

Q. Burns are spoken of as being in different degrees. Can you say what degree of burn that man had? A. It was pretty severe.

Q. In what degree? A. A moderately deep burn.

Q. A burn of the third degree? A. We don't use that term.

Q. Isn't it a fact that doctors, in describing burns to some part of the outer surface, do speak of them as being in the first, second and third degree? A. I never heard of it.

Q. Was this patient ever despondent? A. I don't recall it. As far as I can remember, he was not.

Q. Do you know anything about the money that was stolen? A. I don't know anything about it.

Q. (by Mr. PHILIP MANSFIELD). During the time he was there and prior to the time he committed suicide, did you see anything about him indicating despondency? A. No, sir.

Dr. George Burgess Magrath, medical examiner, testified that he is a pathologist and has been a medical examiner for seven years. He performed an autopsy on Sponatski on October 14.

Q. As a result of your examination, what is your conclusion as to the cause of his death? A. That he died from multiple injuries, fracture of the rib and spine, with resulting shock, and, as to the circumstances, that these were caused by precipitation from a height, with this result.

Q. Did you make examination of his brain, Doctor? A. Yes.

Q. What was the examination? A. Brain, 1,485 grams; over the rear part of the brain was a blood stain; the arteries of the base of the brain were normal.

Q. From such an examination as you made of the brain, could you tell whether the man was or was not insane? A. I should say that he did not have any form of insanity, except possible general paresis, but for any other form I could not express an opinion. The optical nerves were normal. The great nerves were in a healthy condition. No inflammation to the coverings of the brain. The brain was in a perfectly healthy condition, save for this slight bleeding, which was incident to the falling from a height. There was no demonstrative injury to the nerve.

Dr. Clifford Walker testified that he was a senior house officer at the Massachusetts Eye and Ear Infirmary and, while not in practice, had been connected there for a year and a half. He took the degree of Bachelor of Science at the Johns Hopkins University, followed by the degree of Master of Science the second year after graduation. He was with Dr. Cushing one year at the Johns Hopkins Hospital at Baltimore, and from there he came to the Massachusetts Charitable Eye and Ear Infirmary, where his services commenced in July, 1912. He was on service on Sept. 17, 1913; he took charge of the Sponatski ward on October 1; he did not change the treatment that had been given him.

Q. That is dropping this collyrium 18 into the eye? A. Yes.

Q. That was dropped in every four hours? A. Yes.

Q. Did he ever make complaint of suffering pain? A. He never made complaint to me of suffering pain.

Q. There was a slight operation performed by you. Will you tell me on what date that was? A. That was discussed the first day I came on service. The eye was perforated. The operation was performed the following day.

Q. How long did the operation take? A. After the eye was cocainized — it takes three drops of 4 per cent. cocaine — the operation takes one or two seconds. It is a certain snipping off.

Q. Where was it performed? A. At the bedside. He sat in the chair.

Q. Is there anything further that you noticed about this man while under your care from the 1st of October to the morning he committed suicide? A. Nothing, except that he was somewhat downcast on hearing, in the wards around, that his vision wouldn't be good thereafter.

Q. Did he say anything to you about losing the sight of his eye? A. No. He asked just one question. He wanted to know if he was going to get the sight back in that eye, and I remember telling him he would not get it back in all probability.

Q. Have you any idea, Doctor, how long a time that was before he jumped from the window? A. That was on the day of the operation — October 2.

Q. (by Mr. PHILIP MANSFIELD). Did I understand the doctor to say that he told the deceased, at some time, that he would never get the sight of his eye back in all probability? A. Probably not get the sight of the eye back as in the other eye.

Q. (by Mr. J. J. MANSFIELD). Did you mean by that, total loss of the sight of that eye? A. No. He probably would have light perception, but it would not be useful. He could tell light from dark.

Q. Is that of much importance? It would be of no use to him, would it? A. No.

Q. Who cocainized the eye? A. The nurse put in the first and second and I put in the third drop.

Q. Did any one assist you in the operation? A. No. It was a perfectly painless operation, and he was not a nervous patient.

Q. And that operation was made necessary by reason of the injury sustained by the molten metal coming in contact with the eye? A. Yes.

Q. That was the direct result of the accident? A. Yes.

Q. You paid no particular attention to him? A. I paid a little more than usual attention to him on account of the fact that I had performed the operation on him the second day, and it was an unusual burn. The whole cornea was burned off, leaving the iris exposed. It was a very unusual condition — unusually severe, and for that reason I always looked at him and followed the case with considerable interest. I never saw such a severe burn before.

Q. Then, in your opinion, it must have been very painful, was it not? A. I should say it was painful the first three or four days only.

Q. Did you ever talk much with him? A. Not particularly, more than to ask him to get up so that I could examine the eye, and that is about all.

Q. Didn't even ask him whether he had pain? A. No, it was obvious he didn't have pain, because all the patients I have had anything to do with complain of pain if they have any.

Q. Did you ever hear at all, until you were present at this hearing, anything said about \$2 or any sum of money having been stolen from a deaf and dumb boy? A. After his death, but not before.

Q. Whom did you hear it from? A. From the nurse. I think it was Miss Manning who told me of conversation about a dollar that some patient lost and that he was accused of taking.

Q. (by Mr. PHILIP MANSFIELD). Would you consider him a brooding patient? A. He might have brooded some, I don't know. He was quiet. He was indifferent about the operation, did as he was told to do, sat down, asked the question, and I told him. He seemed crestfallen.

Q. When you told him he probably never would get the sight of the eye back, did he betray emotion? A. No, not as much as I have seen patients betray.

Dr. Joseph W. Courtney testified that he was a specialist in diseases of the mind and the nervous system, and had made a study of the nervous system for twenty-one years. He had never been connected with any insane hospitals or insane boards.

Q. You heard all the evidence as to this man's condition at the time he met with the accident and what his condition was during his stay in the hospital? A. I heard all the testimony with the exception of that given by his mother.

Q. Assuming that she saw her son on the 5th of October in the hospital and she brought in some fruit in a bag and he tore the paper bag into small pieces; that at that time she noticed that he was nervous, and she had her son call up the hospital and tell them to look after him; that preceding the accident he was sunny, and that he was nervous and depressed at that time in the hospital. There was no insanity in the family. Now, Doctor, what in your opinion was the cause of this man committing suicide? A. I think it is the result of the depression brought about by the thought of future disability so far as his eye was concerned.

Q. Have you read the letter, Doctor? A. Yes.

Q. What is your opinion as to that? Was the letter written by a sane or insane person — taken in connection with all the evidence? A. I see no evidence of insanity in that letter.

Q. Assuming, on the Saturday before the accident, that this man said to his wife, "There is a man passing in front of us," when, as a matter of fact, there was no man passing in front of him, — what would that indicate to you? A. That is an illusion or delusion or hallucination, and is very possibly due to the irritation from the trouble in his eye.

Under cross-examination by Mr. J. J. Mansfield he was asked: —

Q. Have you had any experience in insane hospitals? A. I have had no insane cases.

Q. Would it alter your opinion to know that he saw a man hiding there? A. No, it wouldn't.

Q. You remember that he persisted in that idea? A. I think that was the wife's testimony.

Q. If he persistently made that statement and thought he saw a man hiding or passing by, those might have been hallucinations and would indicate an insane condition? A. If he complained of it to anybody with whom he came in contact, with doctors or nurses or patients, if he ran away or hid from him, I should consider him insane, otherwise not.

Q. If he had very limited opportunities to tell nurses or doctors; if the doctors made hurried rounds, visiting in one-half hour three floors, and the nurses had several beds or wards to look after and had little opportunity to look after the patients, you wouldn't expect him to pursue them and tell them? A. No, but if the doctor said, "How are you this morning?" and asked questions, I should expect that he would come right out with it.

When asked to express the difference between illusion and hallucination Dr. Courtney stated: —

If a man sees a stump and thinks that is a man coming toward him, that is an illusion — he misinterprets his impression. If there is nobody there

at all, that is an hallucination. An hallucination is where a person thinks he sees.

Q. What is there about that letter that caused you to think it was written by a sane man? A. There is nothing about it that indicates that it was written by an insane man. He exonerates his own family, his wife and his wife's family.

Q. Do you think it natural that a man who is going to commit suicide and who is sane and has been on perfectly pleasant and cheerful terms with his wife and family and other people, and there was not the slightest breath of suspicion against his wife, to say that no one is to blame, that he himself is to blame, when, as a matter of fact, he was not to blame at all, had not committed any wrongdoing, but had been the unfortunate victim of a very sad accident which had produced partial blindness, is it natural for him to protest that it is all his fault and to exonerate other people? Don't you think it a very unnatural thing for a sane person to do? A. No. He knew they were all right, but the world never knew. It is not unusual for a man facing the hereafter to say that nobody is to blame. Insane people rarely leave any word prior to the suicide. They commit suicide when they get the impulse.

Q. You don't mean to say it is a matter of impulse with insane people?

A. Yes.

Q. You heard one of the attendants or nurses say he looked like an insane man as he was sitting there? A. No, I don't recall that.

Q. That would change your opinion? A. No, because they don't have to have some special look before they commit suicide. They commit suicide after they have chatted pleasantly with somebody.

Q. Did you hear the testimony about his changing his manner very greatly about his wife? He had been affectionate and loving before and was indifferent afterwards? A. That makes me feel that the man was absolutely downcast and was all down and out on the chances for eyesight.

Q. When you heard the testimony that this letter was written in a very different handwriting from the usual handwriting of this man; that even the signature was very different; that the name looked like Martin instead of Charles, and you were informed that he could spell and use good English and write good English, and this letter is different in those respects, wouldn't that show some changes in that man? A. Not mentally. It might emotionally. I wouldn't care to pass on that question.

Q. (by Mr. HOLMAN). Isn't it a form of insanity, Doctor, when a man thinks people are watching him when they are not, and when he continues to think so and thinks he is accused of stealing and is going to be arrested, when he sees these people when they don't exist at all? A. You mean about that is a continuous state of mind?

Q. How continuous would it have to be? A. It would have to be right along, from the beginning of the case to the end. The physicians who have testified have testified that they had the hospital in insanity matters at all, and if there was something striking given by him.

ing which came up they would know he was insane, otherwise they would not. The man might be insane and they would not know it, but when his people notice the change — he has been very thoughtful and kind, and loving in his usual treatment of them, and he changed his nature entirely and he sees them with indifference, — would or would not that indicate that there was a mental unbalance there? A. It would not be strong proof. You would find that in nervous exhaustion — plain nervous exhaustion — without any mental disturbance at all. That is a very common occurrence.

Q. If a man imagines that somebody is accusing him of something when nobody is, and he persists in that, and he whispers to his wife not to open her bag and take anything out because he was afraid he would be arrested because this man is there for the purpose of arresting him; if this happened on Tuesday, and on Thursday that man was seen sitting in the window, and had been there for some time, and was spoken to by the nurse, and he had turned and looked to her with unseeing eyes and with vacant stare in his eyes, and almost immediately after that he threw himself out of the window, — taking that in connection with the incident of two days before, would you say that indicated sanity or insanity? A. I shouldn't want to draw any conclusion on those two facts.

Q. Taking those three facts into consideration, — that he wrote this letter some time before he committed this act; that he appeared in this frightened manner; that he had a delusion or hallucination that he was being accused and would be arrested and wouldn't let his wife open a bag; and following that up, within a day or two, with the position in which he was found early in the morning, and the general expression in the man's eyes, and that sort of thing, immediately followed by this act of committing suicide, — wouldn't it be as reasonable, as consistent, to say that the man was insane as that he was suffering from depression? A. It doesn't appear to me so. I don't think the facts make out the case as strong that way.

Q. But taking in mind the testimony of the physician who performed that slight operation that he didn't seem near as depressed on learning that his eyesight would probably be destroyed, as usual; that he seemed crestfallen, but was not depressed as people usually are when they know their eyesight is going, — would you say that that was depression? A. No, I shouldn't. But taking that with what his wife says, — that she tried to cheer him up and say it was not bad, and that every time he was more depressed, — I should call that very striking in her testimony.

Q. If he said there was a man watching him, — he had good vision in one eye, — with that normal vision, if he said there was a man sitting in that chair in front of you, and if he was watching every movement that his wife was making, and that she must not open her bag because this man would arrest him for theft, — would that be a delusion? A. Yes. It would be a delusion and hallucination.

Q. At the time there was mental unbalance there? A. Possibly, taking that isolated case.

Q. If he thought somebody was watching him, and no one was there at all at that particular time, he was mentally unbalanced? A. We can assume that it would be a reasonable conclusion. It is possible.

Q. Do you know whether an operation on the eye or an injury to the eye frequently results in insanity? A. No, I cannot say that I do know it. People are just as apt to go to pieces after any operation as an operation to the eye.

Q. Just as aptly? A. Yes.

Q. If Dr. Dewey stated that that was a fact, you would accept it?

A. I wouldn't accept or dispute it. I don't know.

The following also appears in the report of the committee of arbitration.

A suggestion having been made that the matter might be placed before an expert on insanity, the chairman of the board of arbitration sent all the testimony in the case to Dr. L. Vernon Briggs, a member of the State Board of Insanity and a well-known alienist, who has had much experience in dealing with insane people and who is a recognized alienist before the courts of this Commonwealth. In reply Dr. Briggs says: —

I have made a careful study of the testimony sent me by you. I am still working on it, and would like a few more days, but I do not believe it will change my opinion that the man had gone beyond the depressed stage preceding so many cases of insanity. When he committed suicide he was, in my opinion, wholly irresponsible, — a victim of imperative impulse, which might have taken a more serious form, or, rather, caused him to commit a more serious crime to others. When he committed suicide I believe his mentality had gone, that he had no insight, that he did not appreciate his act or its consequences. I shall write more fully later.

Under date of April 2, Dr. Briggs writes: —

I have gone over the testimony relating to the Sponatski case, and, in my opinion, Sponatski's depression was directly due to the loss of his eyesight. The fear that he might lose the sight of the other eye, together with the fact that he was left much alone and not able to use his eyes, in my opinion, caused a further depression, resulting in a mental disturbance which included delusions and hallucinations. As the result of these delusions and hallucinations he threw himself out of the window and met his death. It is the act of an insane man, and I find no testimony which warrants my finding the act to be one resulting from simple depression.

We think the evidence of Dr. Briggs was improperly admitted. We do not think that it was evidence which should

be considered in the case, and in making our findings and rulings we reject the statements of Dr. Briggs and do not consider them.

The insurer asked for the following requests: —

1. Burden of proof is upon dependent to prove that the death of her intestate resulted from injuries sustained by him in the course of his employment.

2. Burden of proof is upon dependent to prove that the death of her intestate was owing to injuries which he received and “arose out of and in the course of his employment.”

3. Burden of proof is upon the applicant to prove that the *sole cause* of her intestate’s death was owing to the injury he received Sept. 17, 1913.

4. If upon all the evidence it is equally probable that he did or did not die as the sole cause of the injuries that he received on Sept. 17, 1913, then the applicant has not discharged the burden of proof, and your finding should be for the employer.

5. Upon all the evidence the applicant has not sustained the burden of proving that her intestate died as the result of the injuries sustained by him Sept. 17, 1913.

6. Upon all the evidence the cause of Sponatski’s death was his own serious and willful act, and therefore your verdict should be against the applicant’s petition.

7. Upon all the evidence Sponatski (deceased), while not in the defendant’s employ, either by his own carelessness or thoughtlessness or willful misconduct, exposed himself to a new danger and such as was not to be reasonably expected or anticipated from the injury, and therefore his dependent is not entitled to recover, and your finding should be against her petition.

8. Upon all the evidence Sponatski’s death was brought about by his own reckless act. It could not be assumed by his employer or any one else that they could have contemplated such an act; that as a result of this injury Sponatski would have thrown himself from the fourth-story window at the hospital. It was his act that caused his death, and it would be guesswork to find that the injury caused or hastened his decease, and therefore your finding should be against the dependent.

9. Upon all the evidence there is no fact or facts upon which you can draw an inference that the injury was the proximate cause of his death; therefore as a matter of law you cannot guess, and your finding should be against the dependent.

10. To allow dependent to recover in this case would be to interpret a language setting up definite conditions and canons of liability (Workmen’s Compensation Act), as if it were really a life insurance.

11. Burden of proof is upon dependent of proving that the cause of death was a personal injury by accident, arising out of and in the course of the deceased’s employment.

12. Upon all the evidence as a matter of law you cannot draw the inference that Sponatski's death occurred by reason or as a result of the injury he received on Sept. 17, 1913. (See No. 11 of B. Cases.)

13. In cases under this act, in the same way as in cases under any other statute or at common law, the plaintiff must prove her case; and although she may establish a state of facts which leads one to think that her version is quite a possible one as to Sponatski's death, she must do something more than show a state of facts which is consistent either with one view or with another view.

14. No competent evidence has been introduced to show any connection between the accident and the death, and your finding should be against the dependent.

15. Upon all the evidence there was no evidence connecting the accident with the death, and therefore your finding should be for the insurance company and employer.

16. Upon all the evidence there is not a scintilla of evidence to support her claim.

17. Upon all the evidence there is only one conclusion that can be reached, and this is, Sponatski's death was by suicide; and no competent evidence was introduced in this case that the accident caused the suicide. The applicant has not sustained the burden of proof that Sponatski's death was from an accident arising out of and in the course of his employment. (See No. 18 of B. Cases.)

18. Suppose you find that the inducing cause for the suicide was the accident of September 17; nevertheless, the suicide might have been brought about by causes other than the accident and entirely removed from the injury; if so, then your finding must be against the dependent, for she has not sustained the burden of proof by introducing such evidence that you could (except by guessing, which you cannot do by law) find in her favor.

19. From the evidence in this case you are not entitled to draw the inference that the death arose from the injury; therefore your finding must be for the employer.

20. Upon all the evidence you cannot speculate and say it is more probable that the injury caused Sponatski to commit suicide. Speculation is not sustaining the burden of proof which is placed by law upon the dependent. (See B. Cases, No. 23.)

21. The evidence is that Sponatski committed suicide, and there is no evidence to support the inference that the injury was the proximate cause to bring about the suicide.

22. Suicide is not a risk reasonably incidental to the work of a molder; it would be extending the provisions of the act beyond all reason, beyond all principle, beyond all authority, if you should find in favor of this dependent.

23. Upon all the evidence Sponatski's death was suicide brought about by his own act and independent of the injury, and due solely to his state

of mind, which could not have been foreseen or anticipated, and therefore the employer cannot be held legally liable for the death. (See B. Cases, No. 32.)

24. There is not only evidence of suicide from Miss Manning, his nurse, but evidence of suicidal intention from his letter (exhibit), and it was never the purpose of this act to place a premium upon the man's taking his own life. The sole purpose of the act is to prevent accidental injuries and death, and certainly not to encourage injured employees to take their own life, whether the injury was serious or trivial, and this death being caused by suicide dependent cannot recover. (See B. Cases, No. 33.)

25. There are many possible causes that may have caused Sponatski to commit suicide, but the dependent, to receive compensation, must do something more than show a state of facts consistent with one view or another view; such evidence is not sustaining the burden of proof, and dependent cannot succeed in her claim for compensation.

26. Upon portions of the testimony of her witnesses she has shown several causes which might have contributed to Sponatski taking his life, and asks you to fix upon the particular one. This you cannot do as a matter of law, and your finding should be for the employer. (See B. Cases, No. 35.)

26A. As a matter of law you cannot, from the evidence in this case, measure the probabilities and say that one is more probable than the other.

27. All the evidence offered in this case is at best suggestions, not supported by facts from which you can draw an inference that death resulted from the injury — you are asked to conjecture or guess; this as a matter of law you are not allowed to do, and therefore your finding should be for the employer.

28. Upon all the evidence you must give a reasonable interpretation to the act; the act was intended to deal with those cases where it is perfectly obvious that the man died from the effect of the accident. There must be some causal connection shown between the injury and the death, and in this case the employer contends that no such evidence has been shown, and that your finding should be against the dependent.

29. Upon all the evidence you cannot reasonably infer that Sponatski's death resulted from the accident, and therefore your finding should be against the claim of his dependent.

30. Upon all the evidence, when you come to theorize as to what caused Sponatski to commit suicide, you are left in the region of pure conjecture. All that is known is that he did take his own life. What caused him to do it, from the evidence, is left entirely unexplained, — one guess is as good as another, and your finding should be against the dependent, for she has not sustained the burden of proof.

31. You cannot draw the conclusion or the inference that that which is necessary to prove has been proved, namely, that Sponatski's death resulted from his injury. The burden is on the dependent, even when, on account of the death of her husband, as in this case, it is more difficult for

her to do so than if he had lived. Having failed to show by competent evidence that the injury caused his death she is not entitled to recover. (See B. Cases, No. 52.)

32. Upon all the evidence Sponatski's death was caused by his own act, which negatives any claim that the injury to his eye caused his death, and therefore dependent is not entitled to recover.

33. The proximate cause of Sponatski's death was his own act of self-destruction, and therefore his dependent is not entitled to recover compensation.

34. The suicide of Sponatski was not a result naturally and reasonably to be expected from the injury to his eye. His jumping from the fourth story to the ground of the hospital was an intervening act by him between the act which injured him and his death, and therefore his dependent is not entitled to receive compensation.

35. Upon all the evidence the dependent has at best shown that there was a possibility of death arising from the injury that her deceased husband sustained, but she has not sustained the burden of proof and shown that it was in fact (the death) a material result from the injury; therefore your finding should be for the employer.

36. Upon all the evidence Sponatski committed suicide in consequence of the depression of mind brought on by the loss of his eyesight, and this is not sufficient to maintain the burden of proof that the injury produced the death.

37. What is within the contemplation of the Workmen's Compensation Act is a material injury, with death materially resulting from it, and upon the evidence there is no such fact, or facts, from which you can conclude that the death so resulted; therefore your finding should be for the employer.

38. There is no evidence that the brain was injured, and therefore there is no evidence to support the fact that the mind was diseased so as to cause insanity as a result of the injury, and without this evidence the dependent has not sustained the burden of proof, and she is not entitled to recover.

39. Upon all the evidence, admitting that the death was the result of the injury, it was not a material, but a moral, result for which his dependent is not entitled to recover compensation.

40. Upon all the evidence you must give a reasonable interpretation to the act, namely, that the act was intended to deal with those cases where it is perfectly obvious that the man died from the effect of the accident. There was no such evidence submitted, and therefore your finding should be in favor of the employer.

By its Attorneys,

DICKSON & KNOWLES.

The 1st and 2d are given. As to the 3d request we do not think the request should be given as asked, because we find

that the injury caused the insanity which brought about Sponatski's death.

We refuse the 4th request for this reason, — that we think the widow has sustained the burden of proof that the injury caused her husband's death.

The 5th, 6th, 7th, 8th, 9th and 10th requests are refused.

As to the 11th request we refuse this request because we do not think that "an accident" is necessary to permit a recovery under the Workmen's Compensation Act of Massachusetts.

The 12th request is refused. The 13th request is given.

The 14th, 15th, 16th, 17th, 18th and 19th requests are refused.

As to the 20th request, while we agree that we cannot speculate, we find that the burden resting upon the claimant has been sustained.

As to the 21st request we find that the insanity resulted directly from the injury, and that the insanity caused the suicide.

The 22d, 23d, and 24th are refused.

As to the 25th, we refuse this request because the facts show that the insanity resulting from the injury caused suicide and death.

The 26th, 26thA, 27th, 28th, 29th, 30th, 31st, 32d, 33d and 34th requests are refused.

The 35th, 36th, 37th, 38th, 39th and 40th requests are refused.

The insurer filed the following supplemental requests for rulings: —

1. That any and all oral or written statements made by Dr. L. Vernon Briggs be stricken from the record.

2. That as a matter of law an arbitrator may not examine a witness in the absence of the parties, or, where there is more than one arbitrator, in the absence of each; therefore the insurer respectfully prays that any and all evidence of Dr. L. Vernon Briggs be stricken from the record and not considered by this Board.

By its Attorneys,

DICKSON & KNOWLES.

In making our findings and rulings we have rejected the testimony of Dr. Briggs, and it should be stricken from the

record. We therefore give the insurer's supplemental requests 1 and 2.

The following requests for rulings were submitted by the attorneys for the widow:—

1. Charles J. Sponatski was injured on Sept. 17, 1913, by reason of hot metal splashing into one of his eyes while in the course of his employment by the Lundin Steel Casting Company, and engaged in performing the duties of his employment.

2. The said injury was a severe injury to the eye, causing an increasing loss of sight, which at the time of Sponatski's death was practically total in one eye.

3. The injury caused intense pain back of the eye, and at the top, back and side of the head.

4. The injury seriously affected and caused serious disturbances of important nerve centers in the vicinity of the eye and in the head.

5. Previous to the accident Sponatski was a man of normal physical and mental make-up, healthy, cheerful, contented, steadily employed at his trade as an iron molder, was a member of the Waltham Watch Company band in good standing, and was happy in his personal and domestic life and not subject to any moods of depression, and was sane and normal in every way.

6. After the accident Sponatski was treated at the Massachusetts Eye and Ear Infirmary, and the condition of his eye from day to day grew worse, and he exhibited from day to day marked changes physically and mentally. He became morose, showed a lack of affection for his wife and child, whom he had previously been fond of, talked constantly about his eye and the condition he would be in without the sight of the eye, and would talk of no other subject, had delusions thinking that there was a hole in his eye, and that there was a man hiding in the room watching him, and that he had been accused of stealing money from another patient, and other delusions, for all of which there was no basis in fact, and later was seen by the head nurse sitting on the ledge of an open window; and when he saw her approaching he looked at her with a wild look in his eye, and having the appearance of a man who was insane, and jumped from the window to the ground below, and later on the same day died, having been conscious previous to his death and talking wildly, thinking that some one was going to shoot him, and not recognizing his wife or others. Underneath the pillow of his bed was found a note indicating the purpose of suicide and written in a handwriting very different from his usual writing, with words misspelt which he would ordinarily spell correctly, his name being so written as to be scarcely recognizable as that of his signature, and the entire letter being so written as to leave his wife and friends in doubt as to whether he wrote it.

7. Sponatski committed suicide while insane.

8. Sponatski's insanity was the result of the injury he sustained.

9. The injury to his eye was the approximate cause of his insanity.

10. His insanity was the approximate cause of his death.

11. The provisions of the Workmen's Compensation Act apply to the death of Sponatski, and the said death is attributable in accordance with the provisions of said act to the injury sustained by him on Sept. 17, 1913, while performing the duties of his employment in the Lundin Steel Casting Company.

12. Under the Workmen's Compensation Act if a workman performing the duties of his employment is injured, and said injury is the direct cause of insanity or any mental derangement within a few weeks after the accident, which causes the employee to commit suicide not as a voluntary sane act but as the result of his insane condition or mental derangement caused by said accident, then his death is attributable to the injury, and persons depending on him are entitled to compensation as provided by said act.

13. There is no evidence of any cause of insanity or mental derangement on the part of Sponatski excepting the injury to the eye which he sustained while in the employment of the Lundin Steel Casting Company.

14. If death is caused by suicide resulting from insanity or mental derangement following reasonably closely upon an accident, the said insanity or mental derangement being caused by the accident and resulting from it, the said death comes under the provisions of the Workmen's Compensation Act, and the beneficiaries named in said act are entitled to compensation in accordance with its provisions.

15. All of the evidence in the case tends to show that the insanity, mental derangement and suicide were the result of the accident.

16. There is a presumption that one who commits suicide is insane.

17. All of the evidence in the case tends to show that the accident was the approximate cause of the mental derangement, insanity and suicide and death of Sponatski.

JAMES F. CREED,
JOHN J. MANSFIELD,
Attorneys.

These requests are refused in so far as they are inconsistent with the findings and rulings of the Board.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
JOSEPH A. PARKS.

CASE No. 567.

HENRY JACQUES, *Employee.*

WAITE CHAIR COMPANY, *Employer.*

TRAVELERS INSURANCE COMPANY, *Insurer.*

CLAIM OF SERIOUS AND WILLFUL MISCONDUCT BY REASON
OF PERSONAL INJURY TO AN EMPLOYEE WHICH RESULTED
BECAUSE OF THE REPAIRING OF ELEVATOR BY AN INEX-
PERIENCED WORKMAN NOT SUSTAINED.

The employee claimed double compensation, alleging serious and willful misconduct on the part of his employer, by reason of the failure of an inexperienced workman to properly repair an elevator which he was required to operate. Because of the manner in which the elevator was repaired, the elevator broke loose from the wire cable which supported it, falling with him in it from the second to the first floor of the building.

Held, that the employee was not entitled to double compensation, the injury not having been caused by the serious and willful misconduct of the employer, as claimed.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Henry Jacques v. Travelers Insurance Company, this being case No. 567 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of David T. Dickinson of the Industrial Accident Board, chairman, Austin E. Livingstone for the employee, and H. W. Blake for the insurer, being duly sworn, heard the parties and their witnesses at the Town Hall, Gardner, Mass., Wednesday, Jan. 7, 1914, at 1.30 P.M.

This employee, a man of sixty-six years, on Sept. 2, 1913, received an injury arising out of and in the course of his employment. The injuries were caused by an elevator which he was operating breaking loose from the wire cables which supported it, and falling with him in it from the second to the first floor of the employer's factory building.

His average weekly wages at the time of the injury were \$11.80, and the agreement for compensation for the injuries was made by the parties at the rate of \$5.90 per week, in ac-

cordance with which agreement compensation is continuing to be paid.

The question before the committee on this proceeding was upon the employee's claim for double compensation, raising the question of whether the injury was caused by "the serious and willful misconduct of the subscriber, or of a superintendent, or of any person regularly entrusted with and exercising the powers of superintendence."

The evidence showed that the wire cables of the elevator had been renewed by a co-employee named Blanchard on Labor Day, Sept. 1, 1913. Blanchard had charge of eight men who worked under him for said employer, receiving orders from him as to the work to be done, such as setting up machines, putting up woodwork for machinery, making most of the repairs on elevators and machines, grinding knives, etc.

A few minutes before the accident this employee, noticing that Blanchard had been repairing the elevator, asked him if it was all right for him, the employee, to use. Blanchard said it was. The employee then proceeded to use it, made one trip to the second floor, and was coming down when the elevator fell. Blanchard had been in the employ of said employer for about twelve years, and had once before connected the counterweight cable to the elevator about five years previously, and the connection he had thus made with the elevator had held securely during said period. He was asked by his general manager, Mr. John H. Waite, to renew and attach the cables. Before doing this Blanchard had examined in detail the former fastening of the cables to the top of the elevator, and had made the hitch or fastening, as he supposed, in the same manner in which it was formerly done, and the same as he had done before in the case of the counterweight cable. The ends of the cable were attached to the top of the elevator by being inserted in a small cone and turned over, inward and upward, inside the cone. Some of the strands were turned in an outwardly direction, but all were inside the cone. The ends of the cables were not made secure and solid by a babbitt formed by melted metal being poured within the cone, as is now usually required by elevator inspectors.

Mr. John A. Deane, an elevator inspector of the city of

Worcester, testified, however, that until about five years ago the method of attaching the ends of the cables within a cone by a clutch without a babbitt was regularly used, and made a secure and solid fastening, if properly done, as the weight of the elevator would wedge a cable more tightly into the cone the more it pulled; that such wedged hitches were so secure, if well done, that the cable itself would be more apt to break in case of an extra strain than would the end of the cable to pull out from the cone.

Blanchard had had no other experience in attaching cables to elevators than the one occasion when he fastened the end of the counterbalance cable to this elevator five years before. He was familiar, however, with the machines used in the establishment and did some repairs upon them.

The committee finds on the weight of all the evidence that Blanchard was a superintendent and in the regular exercise "of the powers of superintendence," but that he was not guilty of serious and willful misconduct by reason of what he did in fastening the cables within the cones of the elevator, or in saying to the claimant that the elevator was all right to run. Blanchard attached the cables to the cone after examining the way it had been done before, and in his opinion the elevator was safe to use when he so informed the claimant.

The committee further finds that although it may have been negligence, and perhaps serious negligence, on the part of John H. Waite, the superior manager, to have asked Blanchard to do this work, such negligence, even though serious, is not sufficient to warrant a finding of double compensation against the subscriber, in accordance with the terms of the act; but that any misconduct of said John H. Waite was not willful, as Blanchard was a careful man, had been employed by the concern for many years, and had properly attached a cable once before to the elevator, which had held in position about five years.

A willful act is a deliberate one, done with knowledge and full appreciation that the injury complained of is likely to, and in all probability will, result therefrom. It does not seem that such a degree of wrongfulness or guilt can fairly be imputed to said general manager.

The following requests for rulings and findings were made by the insurer at the hearing:—

1. Mr. Blanchard was not a superintendent within the meaning of the act.

2. There was no evidence of serious and willful misconduct on the part of any person regularly intrusted with and exercising the power of superintendent or on the part of the employer.

3. Mr. Blanchard was not guilty of serious and willful misconduct.

These requests are all dealt with and covered in the findings.

No question was raised at this hearing as to the compensation or state of incapacity of the employee, said incapacity and compensation therefor still continuing.

DAVID T. DICKINSON.

HERBERT W. BLAKE.

Austin E. Livingstone dissents.

CASE No. 578.

JULIA SHEA, DEPENDENT AND MOTHER OF JAMES D. SHEA,
Employee.

H. E. SAWIN, *Employer.*

UNITED STATES CASUALTY COMPANY, *Insurer.*

ALLEGATION OF INSURER THAT EMPLOYEE RECEIVED FATAL
INJURY BY REASON OF HIS OWN SERIOUS AND WILLFUL
MISCONDUCT NOT MAINTAINED. COMPENSATION AWARDED
DEPENDENT MOTHER.

The insurer claimed that the employee received the injury which caused his death by reason of his own serious and willful misconduct, to wit, intoxication. The evidence failed to maintain this claim and showed that the deceased was in a normal condition and well able to perform his customary work.

Held, that the injury did not occur because of the serious and willful misconduct of the employee, and that the dependent mother was entitled to compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Julia Shea, dependent and mother of James D. Shea, v. United States Casualty Com-

pany, this being case No. 578 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of Joseph A. Parks, chairman, representing the Industrial Accident Board, John A. McCaig, representing the insurer, and Thomas Hadley, representing the employee, heard the parties and their witnesses in the Aldermanic Chamber, City Hall, Cambridge, Mass., Friday, Jan. 16, 1914, at 10.30 A.M.

Harry N. Stearns, Esq., of Cambridge, Mass., appeared for the dependents of the deceased, and A. R. Belyea represented the insurer.

The insurer refused to pay compensation on the ground that the employee was injured by reason of his own serious and willful misconduct, due to intoxication. The insurer further claimed if the committee found as a fact that the injury arose out of and in the course of his employment, it was in doubt as to the exact extent of the dependency of the mother of the employee.

James D. Shea, the deceased employee, a driver in the employ of H. E. Sawin, of Cambridge, Mass., received a personal injury arising out of and in the course of his employment on Oct. 27, 1913, by reason of a fall from his wagon, which fractured his skull. He died on Oct. 31, 1913, at the Cambridge Hospital as a result of said injury.

Joseph Frank Abbott, 7 St. Clair Street, Cambridge, Mass., testified that he worked for H. E. Sawin for seven years, and was working for him as a driver at the time of the injury to the deceased. He knew the deceased for about ten years, and on the day of the accident saw him several times, namely, at 8.30 and 10.30 in the morning and at 1.30, 5 and 7 o'clock in the afternoon. He was sober on each occasion. He saw him again when he was coming out of the office after they picked the employee up. He next saw the employee starting to pile his load in readiness for another delivery. The deceased walked steadily and there were no indications of drink on him.

Charles H. Fleck, 27 Lloyd Street, Watertown, Mass., testified that he was foreman for H. E. Sawin and had worked for him about fifteen or twenty years. He saw the deceased several times during the day of the accident, about the hours of

10.30, 11.25 o'clock in the morning and 2, 5, and 7 o'clock in the afternoon. On these occasions there was nothing to call attention to his actions and he was performing his work properly.

H. E. Sawin, the employer, testified that James D. Shea had worked for him practically ever since he had been in business. At the time of the accident the deceased was employed as a driver and earned \$12 per week. Mr. Sawin saw the deceased several times during the day and remembered seeing him at 8.30 and 10.30 o'clock in the morning. He also saw him after he had fallen from the wagon, at about 7.30 o'clock in the evening. The deceased was in the office about five or ten minutes after the accident. He then got up and walked to his wagon, and upon inquiry as to whether he was all right, the deceased answered, "Yes." Mr. Belyea, representing the insurer, asked Mr. Sawin the reason he stated on the report of the accident made to the insurance company that it was caused by intoxication. Mr. Sawin replied that by intoxication he did not mean that Shea was drunk, but had been drinking. He further stated that he had no actual knowledge that the deceased had been drinking, but simply assumed that he had.

John J. Dineen, 53 Winslow Avenue, West Somerville, Mass., testified that he was a helper on the wagon with the deceased on the day of the accident, and was with him all during that day. They started on the route about 9.30 o'clock in the morning, making calls in Boston, and only once during the day had the deceased left him to go into a barroom, near Dartmouth Street. The deceased remained in the saloon about ten minutes and had two glasses of beer. The deceased, at the time of the accident, was sitting on the wing of the wagon, booking freight. Dineen handed him a bundle to book, and after the deceased had booked it, he lost his balance and fell over the wing. His head struck the curbstone and his feet landed in the gutter. He was sure the deceased was not intoxicated.

John L. Shea, brother of the deceased, testified that his brother James lived with his mother and an invalid sister. His sister was about thirty-five and his mother about sixty-five years old. His sister was not able to work, and his mother was not feeling very well at the present time. His mother owns

a house in Cambridge, which is badly in need of repair. They do not get any income from it, not being able to rent it. His brother James, the deceased employee, gave his mother \$7, \$8 and sometimes \$10 per week. He had seen James give the money to her quite often when he lived at home, and the deceased had also told him that he gave his mother \$8 per week steadily.

Mrs. Julia Shea, mother of the deceased, testified that she had three sons, John, James and Jeremiah. James lived with her all the time and contributed to her support. He gave her \$7 and \$8 per week, and sometimes had given her as much as \$10 and \$11. When John was working he would contribute to her support also, but he had not lived at home for some time. Whenever she was in need he would help her.

The committee of arbitration finds, upon all the evidence, that the claim of the insurer — that the employee was injured by reason of his own serious and willful misconduct, to wit, as the result of intoxication — is not sustained, the evidence showing that the employee was not intoxicated, but, on the contrary, was in a normal condition and well able to perform his usual work properly.

The committee further finds that the personal injury received by him on Oct. 27, 1913, arose out of and in the course of his employment, and that death resulted from said personal injury; that his average weekly wages were \$12; that he contributed an average of \$8 weekly to the support of his mother, Mrs. Julia Shea, who was partially dependent for support upon him at the time of said injury; and that the said dependent mother is therefore entitled to a weekly payment of \$4 for a period of three hundred weeks from the date of the injury.

JOSEPH A. PARKS.

THOMAS HADLEY.

JOHN A. McCAIG.

CASE No. 579.

J. DIBILIO, *Employee.*

WALWORTH MANUFACTURING COMPANY, *Employer.*

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, *Insurer.*

EMPLOYEE TOTALLY INCAPACITATED. RECOMMENDATION MADE
THAT INSURER FURNISH AND EMPLOYEE ACCEPT FURTHER
MEDICAL TREATMENT.

The evidence showed that the employee received a peculiar and serious injury which in fact incapacitated him wholly for work. There was need of further expert medical treatment in order to more promptly restore the employee to normal working efficiency.

Held, that the employee was totally incapacitated for work.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of J. Dibilio v. American Mutual Liability Insurance Company, this being case No. 579 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Edward F. McSweeney of the Industrial Accident Board, chairman, Frank Leveroni, Esq., representing the employee, and Vittorio Orlan-dini, Esq., representing the insurer, heard the parties and their witnesses in the Board Room of the Industrial Accident Board, Pemberton Building, Boston, Mass., at 2 P.M., Wednesday, Dec. 16, 1913.

The facts regarding this injury are as follows: —

At 11.45 A.M., on Aug. 1, 1913, Dibilio was employed as a helper by the Walworth Manufacturing Company, who is insured with the American Mutual Liability Insurance Company, at an average weekly wage of \$11. Dibilio was working the electric crane on a galvanized sheet iron bend, and struck the pipe with his crane, causing the bend to come apart. While engaged in fixing it, and trying to put the bend back again, it fell, striking him on the back of the neck. He was taken to the Carney Hospital, suffering from a strained back in the dorsal

region. X-ray photos show that Dibilio's second vertebræ was dislocated on the third, and that he had a severe strain of the vertebral ligaments.

The injured man has been paid compensation at \$5.50 a week, one-half his average weekly compensation, up to and including Dec. 17, 1913, two days after the date of this hearing.

The question at issue is as to whether payments shall continue from December 17. The representative of the insurer states that, in addition to compensation, a hospital bill amounting to \$17 had been paid by the insurance company; and for the purpose of curing Dibilio so that he could resume work at an early date the insurer had arranged with Dr. S. A. Ellis, a regular physician who specialized in osteopathy, to treat Dibilio, the expense of which treatment the insurer was to pay. Dr. Ellis' treatments of Dibilio were given after the two weeks' medical waiting period had passed. Dr. Ellis treated him for more than two weeks, after which time Dibilio refused to submit himself for further treatment. The insurer claims that since it has offered the services of a competent physician to help restore Dibilio to health, and he has refused that service, it is entitled to stop further payments for disability.

Dr. S. A. Ellis of 687 Boylston Street testified that he examined Dibilio first on September 27, and treated him for a period of two and one-half weeks, the last treatment being on the 14th of October. He found him suffering from the results of a blow on the back of the neck, with soreness in the cervical vertebræ. The dorsal spine was forcibly extended, and the spiral ligaments strained, and some of them probably ruptured. Dr. Ellis failed to find the serious symptoms which he would expect to find in case of injury to the tissue. Legs and arms seemed to be perfectly normal under movement. He treated his neck, with the idea of reducing this slight dislocation, which was accomplished during the treatments, and the pain was reduced to the dorsal spine. In Dr. Ellis' opinion there was no fracture. He gave the patient manipulation treatments which were necessarily painful; found him to be a neurotic, rather hysterical, and not able to withstand pain. Seemed to be terribly frightened, and did not expect to get better, which condition helped retard his recovery. At the time of the last

treatment he could bend his head and rotate it. In Dr. Ellis' opinion, if Dibilio had continued to receive treatment for a further period he would have been able to resume some part of his work in ten days or two weeks, and probably be able to do his regular work in about six weeks. Without further treatment he would probably be incapacitated for several months, but eventually this trouble would straighten out of itself. On the day of the hearing Dibilio was obviously much better than when Dr. Ellis last saw him on October 14.

Dr. De Amezaga of 342 Hanover Street, Boston, testified that if the injured man suffered from the injury described in the reports and as shown by the X-rays, even if he were not a nervous man, it would incapacitate him for work for a long period. The manipulation treatment spoken of by Dr. Ellis was not likely to be efficacious in such a case, and could not be given with good results unless the patient were etherized. It was impossible to make effective manipulation treatment for a dislocation of the neck or vertebræ without ether.

Dr. Roland W. Brayton, graduate of Harvard Medical School, examined Dibilio for the American Mutual Liability Insurance Company, and was convinced that the man's suffering was genuine and that he was sincere in describing his injury and the pain which followed. He found tenderness over the patient's right shoulder. Second vertebræ seemed to be dislocated on the third, and it takes but little movement, after an injury like this, to elicit a great deal of pain. Dr. Brayton also believed that it was not possible to treat an injury of this sort by manipulation unless the patient were etherized.

J. Dibilio, the injured man, testified that he found little or no benefit as the result of Dr. Ellis' treatments, and he would not be willing to undergo any further treatment recommended by the insurer.

The arbitrators find that Dibilio, as a result of the injury arising out of and in the course of his employment, was incapacitated for labor from Aug. 1, 1913, and is entitled to reasonable hospital and medical charges for the first two weeks after the injury, and to disability compensation at one-half his average weekly wage of \$11, or \$5.50 weekly, from the fifteenth day after the injury. These disability payments have been

made up to and including Dec. 17, 1913, and the American Mutual Liability Insurance Company should continue to make these payments for an indeterminate period, while the disability lasts.

The arbitrators recommend to the insurance company that while its legal obligation to furnish medical and hospital services is restricted to the first two weeks following the date of injury, in their opinion adequate medical treatment, either at the Massachusetts General, Carney or other hospital equipped to render such service, to be furnished at the expense of the insurer, will greatly reduce the injured man's disability and restore him to industry, and that this will be the least expensive and most satisfactory way to deal with this case.

The arbitrators recommend to Dibilio that he accept this medical treatment, if offered, and in any case the obligation is on him to do everything possible to restore himself to health, to the end that he may return to work.

EDW. F. MCSWEENEY.

FRANK LEVERONI.

VITTORIO ORLANDINI.

CASE No. 581.

MARGARET CARROLL, SISTER AND DEPENDENT OF RICHARD CARROLL (DECEASED), *Employee*.

KELLY & KEARNEY, *Employer*.

UNITED STATES CASUALTY COMPANY, *Insurer*.

FATAL INJURY TO EMPLOYEE, FOUND AFTER UNEXPLAINED ABSENCE, AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT.

The employee left the shop to fill a bottle and did not return. His unexplained absence caused a fellow employee to look for him, and he noticed that he was lying at the foot of a stairway upon which the employee stood while filling the bottle. He was dead when discovered.

Held, that the fatal injury arose out of and in the course of his employment.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Margaret Carroll,

sister and dependent of Richard Carroll, v. United States Casualty Company, this being case No. 581 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of James B. Carroll of the Industrial Accident Board, chairman, James Fallon, Esq., of Pittsfield, representing the employee, and George A. Prediger, Esq., of Pittsfield, representing the insurer, heard the parties and their witnesses at the Aldermanic Chamber, City Hall, Pittsfield, Mass., on Monday, Dec. 15, 1913, at 2 P.M. A. R. Belyea, Esq., appeared for the insurer, the dependent not being represented by counsel.

On Nov. 8, 1913, Richard Carroll, employed by Kelly & Kearney, was fatally injured.

The insurance company brought this case to arbitration on the questions of the extent of dependency and the cause of the accident.

William O'Brien, one of the employees of Kelly & Kearney, testified: —

When Mr. Carroll first came in at 12 o'clock, noon, I spoke to him. He went down stairs to fill a bottle, and as he was gone quite a while I went over to the head of the stairs to see what was keeping him, and I saw him lying there. I called to Mr. Kearney and then went downstairs to pick him up. This was about fifteen or twenty minutes past 12 o'clock. Going downstairs on the left there is a little shelf, and we put barrels on this, and when we fill a bottle we have to stand on the third or fourth step. It was so busy at this time of day we would not be able to hear any noise.

Robert Kelly, one of the proprietors, testified that —

Carroll came to work about 12 o'clock noon, and I spoke to him. He took off his hat and coat and then started filling some bottles. Suddenly O'Brien yelled and I looked down and saw Carroll lying in the cellar. We pulled his collar off and took him to the back door to get the air, but he was dead. His skull was fractured. He had been working for me for two years and had been well and healthy all the time. In order to fill the bottle he would have to reach over, and when this bottle was found it was on the floor with the cork out. From the way his skull was fractured I think he must have turned on his ankle and fallen downstairs and struck the post at the bottom of the stairs. The funnel was found under the bottom step. This funnel is always on top of a jug on the shelf. The men hang their hats and coats on the left side also as you go downstairs.

Miss Margaret Carroll, sister and dependent of Richard Carroll, testified: —

I know nothing about this accident except what they told me. I have lived with my brother for six years and he has given me \$8 per week, and with this \$8 I bought the groceries and such as that. He paid the house rent, the water taxes, and in the fall bought the coal. If I was buying clothes for myself he would always ask me if I had enough money, and if not he would give me some more. I saved nothing from this money and had no other money but what he gave me. The house rent was \$10 a month. Previous to keeping house for him I kept house for my mother until she died. Before that I worked in the mill at weaving. If there was good work I would make \$10 or \$12 a week and sometimes I would make less. On the morning of the accident my brother got up about 8 o'clock and sat in the house reading all morning. Shortly before dinner I told him he ought to go out to walk so that he could eat better, and he went out for a short time. He said he would have to work late that night, so did not want to take too long a walk.

Mr. Belyea, appearing for the insurance company, introduced the medical examiner's report, which reads as follows: —

You are hereby notified that on the eighth day of November in the year 1913, I received notice that there had been found and was then lying dead in the city of Pittsfield the body of Richard Carroll, who was supposed to have come to his death by violence; and upon receiving said notice I forthwith took charge of said dead body, and upon examination thereof and personal inquiry into the cause and manner of the death I am of the opinion that such death was by violence, to wit, by fracture of the skull, separation of larynx, from falling downstairs.

Upon personal inquiry, I learned that said Richard Carroll was employed by Robert Kelly at his saloon at 185 Wahconah Street. Deceased was standing at head of cellar stairs, had taken some bottles off a shelf to put in the cellar. Bartender heard something fall and on turning around saw that deceased had fallen down the stairs. He lived but a few minutes after being taken upstairs. There were two scalp wounds, one at back of head and one on left side of head, bleeding from the nose, and a separation of upper part of larynx. Probable fracture of skull. Kelly tells me that deceased was a temperate man, was industrious and had a good home and family.

Dated at Pittsfield in the county of Berkshire on the tenth day of November, 1913.

Upon this evidence we find that Richard Carroll on Nov. 8, 1913, received a fatal injury which arose out of and in the course of his employment, and that he contributed weekly to

the support of his sister, Margaret Carroll, the amount of \$8 per week, and that she is entitled to the payment of \$4 per week for a period of three hundred weeks, dating from Nov. 8, 1913, the day of the injury.

JAMES B. CARROLL.

JAMES FALLON.

GEORGE A. PREDIGER.

CASE No. 584.

CLARA CUNKA, *Employee.*

PACIFIC MILLS, *Employer.*

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, *Insurer.*

THE EMPLOYEE, A MINOR, ENTITLED TO COMPENSATION ON
ACCOUNT OF INCAPACITY FOR WORK DUE TO INJURY.

The employee, a minor, fifteen years of age, received a personal injury arising out of and in the course of her employment, as a result of which the ring finger was wholly amputated and the index and middle fingers were rendered permanently incapable of use below the middle joint. The little finger was also injured. *Held*, that the employee was totally incapacitated for work and entitled to compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Clara Cunka v. American Mutual Liability Insurance Company, this being case No. 584 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of David T. Dickinson of the Industrial Accident Board, chairman, Edward A. McAnally, Esq., for employee, and Irving Southworth, Esq., for insurer, heard the parties and their witnesses in the Hearing Room, Court House, Lawrence, Mass., on Wednesday, Dec. 17, 1913, at 10.30 A.M.

The committee finds that the employee received an injury arising out of and in the course of her employment on July 18, 1913. She was at this time a minor, fifteen years of age. She will be sixteen on Feb. 23, 1914. The injury was caused

by her left hand getting caught in a machine in the course of her work at the employer's mills. As a result of the injury the ring finger of the left hand was wholly amputated. The index and middle fingers of the hand were rendered permanently incapable of use from or below their middle joint, and the thumb and little finger also injured.

The committee finds that this employee as a result of this injury has been wholly incapacitated for work from the date of its occurrence, and still so continues as a result thereof, and that she is entitled to compensation at the rate of \$4 a week from August 1, the fifteenth day after the injury, and during the continuance of said total incapacity. Her average weekly wages at the time of her injury were \$3.50. She is also entitled to a weekly compensation of \$4 for a period of twenty-five weeks from the date of the injury, by reason of the complete amputation of the one finger and the permanent loss of use from or below the second joint of the fingers as above mentioned. The fingers and hand at the time of hearing were still sore and tender and not yet in practical condition to use in work. It appears that she will be able to work in the future and can probably secure such employment with her former employer, and that her compensation should be adjusted later, as the facts regarding her earning capacity then appear.

This decision and all findings regarding compensation or the existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III., of the Workmen's Compensation Act and the general provisions of said act and its amendments.

DAVID T. DICKINSON.

IRVING SOUTHWORTH. •

Edward McAnally dissents.

CASE No. 586.

JOHN LEDOUX, *Employee.*

AMERICAN WOOLEN COMPANY, *Employer.*

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., *Insurer.*

INCAPACITY FOR WORK DUE TO NATURAL CAUSES AND NOT,
MATERIALLY CONTRIBUTED TO BY EMPLOYMENT. EMPLOYEE
NOT ENTITLED TO COMPENSATION.

The employee, a night watchman, had started on his last round, and, without meeting with an accident or receiving a personal injury arising out of and in the course of his employment, fell to the floor. It was afterwards found that he had sustained an apoplectic shock.

Held, that this was not a personal injury arising out of and in the course of his employment.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of John Ledoux v. Employers' Liability Assurance Corporation, Ltd., this being case No. 586 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of Dudley M. Holman of the Industrial Accident Board, chairman, Edward H. Hughes of Webster, representing the employee, and Edwin H. Crandell of Worcester, representing the insurer, heard the parties and their witnesses in the Town Hall, Webster, Mass., on Friday, Dec. 19, 1913, at 11 A.M.

There was no dispute as to the date of the accident, which was Aug. 24, 1913, at 5 A.M.; no dispute as to the average weekly wage, which was agreed to be \$12.56; and no dispute that while he was making his rounds in the course of his employment something happened to him.

It appeared in evidence that just as Ledoux was starting on his last round as night watchman he called to the night fireman, Henry St. Armand, who was in the boiler room, about 40 feet away from him at the time that he called. St. Armand did not see Ledoux fall, but when he came to his assistance, Ledoux was on his hands and knees and could not get up

alone. When he picked him up, Ledoux was conscious, and told him to take him out into the cool air. Ledoux did not trip over anything, and there were no steps at the place where he fell.

Bertram S. Jewell, the day watchman at the mills, arrived at that date shortly after 6 o'clock, and found Ledoux out in the fresh air, the night fireman having been engaged in getting him ready to take home. Jewell asked Ledoux what he wanted, and he replied that he wanted Dr. Roy. Jewell telephoned to his, Jewell's, father, and to the doctor. When Dr. Roy came, Ledoux could not speak, he just mumbled. Witness declared that Ledoux stated that he felt dizzy, and started towards the sink to put water on his face, and fell.

Mr. Jewell, Sr., stated that there are two steps leading up to the place where the watchman goes to change his clothes, but that Ledoux did not fall there. He fell near the sink, which is about 20 feet away from where the steps are. There were no machine tools near the place where Ledoux fell, so that he could not strike against them in his fall. There was a pump about 6 feet away from the place where he fell.

Ledoux had been employed at the mills for about twenty years, and Michael A. McNamara, the paymaster, testified that Ledoux was very seldom out.

Dr. Joseph N. Roy was called on the morning of this event. He stated that Ledoux had had an apoplectic shock and that he also had an injury to his left shoulder. He is helpless. He moves his leg a little bit, but cannot move his arm at all. He suffers pain in the arm, but otherwise has no pain. The injury to the shoulder must have been brought on by a fall. "I found, when I was first called to him, that he was completely paralyzed on his left side. The loss of the use of the shoulder is due to a traumatic injury, although there is impairment of motion due to the shock itself. He is a man sixty years of age, and his blood vessels are probably not in very good condition." The doctor was positive that he had never had a prior shock. The condition of the arteries is harder than is usual for a man of his age. The doctor did not believe that he would ever be able to do his normal work again, and was very skeptical that he would ever be able to do much of anything. Dr. Roy

further stated that he examined the head to see if there was a traumatic injury, after he found the injury to the shoulder, but he did not examine his head at the time of the event. Ledoux called the doctor's attention to the shoulder when he told him that he thought it strange that he could move his leg but not his arm. He then thoroughly examined him. This was about two weeks after the event. If there had been an injury to the head it would have probably disappeared in two weeks' time, and there were no objective symptoms, so that he was not positive whether there was a bruise on the head or not. He stated that he was not positive that this man did not hit his head in such a way as to produce a traumatic injury which resulted in a stroke of apoplexy. It is possible that the blow which put the shoulder out of commission, if received on the head, might cause a rupture of an artery of the brain. It is as consistent with a traumatic injury as it is that it resulted from natural causes. Before the doctor found the injury to the shoulder he was of the opinion that Ledoux had had a shock and then fell down, but after he found the injury he questioned this. He now thinks that Ledoux probably had the fall before he had the shock, as he was not completely paralyzed at first. He called for help, and when the doctor arrived he could not talk at all. Ledoux told the doctor that something seemed to pass over him, and he tried to get to the wash room to wash his face, and then he fell. It is very hard to tell whether the injury would bring on the shock.

Dr. Lemuel F. Woodward of Worcester testified that he is chief of the surgical staff at the City and Memorial Hospital. He examined Ledoux at his home. He was up and dressed and spoke without any difficulty. He speaks French, but very little English. The left hand was totally paralyzed — absolutely useless. The right hand was strong. There was no motion in the left hand, and no motion from the shoulder. The left leg was very badly paralyzed, but he did have a little bit of power, so that with the help of his wife and a crutch he could drag the leg a few steps on the floor. His mind seemed clear. The only thing was that the motion of the shoulder joint on the left was limited more than the doctor should have expected in a case of paralysis only. In cases of paralysis they get restricted motion

in the arms even from old people, and in this case the restricted motion was more than would be expected from paralysis alone. He believes that some limitation was caused by the fall. When asked how long that limitation is liable to last as a result of the fall, Dr. Woodward stated that it would last indefinitely, because he has no possibility of using the arm. It is absolutely paralyzed. It was the doctor's opinion that Ledoux had the shock, and the fall was secondary. Given a man sixty years old, a hard-working man, with his arteries in the condition found in Ledoux, who sustained a fall that was serious enough to cause a serious injury to his shoulder, he should think it improbable that that would be a sufficient cause to so rupture one of the weakened arteries as to produce a condition of apoplexy, with paralysis following. He could not say whether the stroke came before or after the fall. The fact that Ledoux felt dizzy and started towards the wash room, and then fell and cried aloud for help in sufficiently loud tones for other people to hear him, would tend to show that the apoplexy had started, brought on the dizzy condition, and as a result the fall occurred. The condition of Ledoux's shoulder is not wholly due to the apoplectic shock. Without the shock, if he simply had the injury to the shoulder, with proper exercise the arm would have got into shape.

We find, therefore, by a preponderance of all the evidence in the case, that the injuries did not arise out of the man's employment, but were the result of natural causes in no way connected with his employment, and that he is not entitled to recover compensation.

DUDLEY M. HOLMAN.
EDWIN H. CRANDELL.
EDWARD H. HUGHES.

CASE No. 589.

JOHN DE PASQUALE, FATHER OF JOSEPH DE PASQUALE, *Employee*.

WILLIAM L. MORRISON COMPANY, *Employer*.

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED,
Insurer.

FATHER HELD TO BE TOTALLY DEPENDENT FOR SUPPORT UPON
EMPLOYEE, THE FACT THAT SAID FATHER ASSISTED IN
CONDUCTING AN UNPROFITABLE STORE HAVING NO BEAR-
ING UPON HIS DEPENDENCY STATUS.

The employee contributed all of his earnings to his mother, who was the custodian of said earnings for the benefit of his father, mother and two minor brothers. A little store had been started, in connection with the tenement in which the family lived, about six weeks before the death of the employee, but it had not been a profitable venture. The father, an invalid, assisted in conducting the store, which was shown to be unprofitable, more money being owed than the stock was worth, and no profit or income being derived from that source.

Held, that the father, mother and two minor brothers were wholly dependent for support.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings and decision of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of John De Pasquale, father of Joseph De Pasquale, v. Employers' Liability Assurance Corporation, Limited, this being case No. 589 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Joseph A. Parks, representing the Industrial Accident Board, chairman, Daniel F. Buckley, North Easton, Mass., representing the employee, and Daniel M. Lyons, 801 Tremont Building, Boston, Mass., representing the insurer, heard the parties and their witnesses in the Aldermanic Chamber, City Hall, Cambridge, Mass., Tuesday, Dec. 16, 1913, at 10 A.M.

The questions involved in this case were the average weekly wages of the employee and the extent of dependency, the in-

surer agreeing that Joseph De Pasquale, the employee, died as a result of a personal injury arising out of and in the course of his employment.

The said employee was employed as a concrete mixer by the William L. Morrison Company, and fell from the top of a building on Nov. 16, 1912, dying, as a result of the injuries sustained, in the Cambridge Hospital on the same day.

Mrs. Zelia De Pasquale, mother of the deceased, testified that her son, the said employee, contributed his entire wages every week, said wages varying from \$14 to \$16. He had always given her his wages ever since he had started to work. He had first earned \$9 per week, working as a water boy. It was her custom to give him from 50 cents to \$1.50 per week for car fares and expenses, including luncheon, the largest sum she ever gave him being \$1.75. She also bought his clothes, shoes and everything he wore, buying about one pair of shoes at a cost of \$2 to \$2.25 per month, and spending about \$25 per year for clothes. The value of his board was about \$2.50 per week. At the time he was killed there were two other children, one six years old and the other six months.

John De Pasquale, father of the deceased, testified that the said employee contributed all his earnings weekly to his mother, and at the time Joseph was killed he did not do any work, and had not worked for three years. He had stomach trouble and heart disease and was physically unfitted for work. His son, the employee, first worked for the Eastern Concrete Engineering Company as a water boy, and received \$9 per week, working there for about six or seven months. Later he worked for a New York company for about four or five months, receiving an average of \$17 to \$18 per week. He had worked for the Morrison Company only a couple of months before he was killed. The only income or support that the family had was what the deceased employee contributed. A very small store was started about six weeks before the fatal injury to the employee, the stock consisting of canned tomatoes and meat, costing about \$140 and not being paid for. At the time of the hearing more money was owed than the stock was worth, and there was no profit or income from the store.

It was agreed that Mr. John De Pasquale, father of the deceased, was not able to work.

William L. Morrison, the employer of Joseph De Pasquale, the deceased employee, testified that the boy informed him at the time he was hired that he had been getting 40 cents per hour where he worked before. He could not pay him 40 cents per hour, and it was agreed that the employee would accept 25 cents per hour. He stated that De Pasquale "was the nicest appearing boy I ever saw." On the day he met with his injury he was at work on a building, which was being erected for the Sterling Knit Goods Company. Some days he worked eight hours and other days twelve hours. About \$15 would be a fair average for a year for a man getting 25 cents per hour, and \$15 per week would be a fair average for De Pasquale.

The evidence shows that the father had been an invalid for a period of over three years, and had not earned any wages or contributed anything to the support of himself, his wife or of his family. He was, in fact, wholly dependent for support upon the earnings of the deceased, the said deceased employee contributing all his earnings to his mother, who was the custodian of his wages for the benefit of the family. A little store had been started, in connection with the tenement in which the family lived, about six weeks before the death of the employee; but it was not a profitable venture, the fact that the father put in a portion of his time in said store having no bearing upon his dependency status, since he received no recompense either directly or indirectly for his services, because business had not been established upon a paying basis. The mother and the two minor children were likewise wholly dependent for support upon the earnings of the employee at the time of the injury.

The Workmen's Compensation Act provides that "if there is more than one person wholly dependent, the death benefit shall be divided equally among them;" and as there were four persons wholly dependent upon the said employee at the time of his injury, there is due each of the said dependents 25 per cent. of the weekly compensation payable under the statute on account of total dependency.

The committee of arbitration finds that the average weekly wages of the employee at the time of the injury were \$15, this finding being in accordance with the interpretation given this phase of the law by the Supreme Judicial Court in the case of *Gillen v. Ocean Accident and Guarantee Corporation*, the said employee having been working but a short time for his employer at the time of said injury, reference therefore being had to the wages earned by others in the same grade, whose employment was substantially continuous.

The committee finds that there is due Zelia De Pasquale, the mother of the deceased, and John De Pasquale, the father, and John De Pasquale, as father and next friend of the two minor children, Erico and Americk, the sum of \$7.50 weekly for a period of three hundred weeks, said \$7.50 to be apportioned as follows: to the said mother, \$1.875; to the said father, \$1.875; and to John De Pasquale, as father and next friend of the two minor children, for their benefit, \$3.75; the weekly payments to date from Nov. 16, 1912.

JOSEPH A. PARKS.

DANIEL F. BUCKLEY.

DANIEL M. LYONS.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, New Albion Building, Boston, Mass., on Thursday, March 26, 1914, at 10 A.M., and affirms and adopts the findings of the committee of arbitration.

The Industrial Accident Board finds that John De Pasquale, the father, Zelia De Pasquale, the mother, and Erico and Americk, brothers of the employee, were wholly dependent for support at the time of the injury upon said employee, and that there is due them the total sum of \$7.50 weekly for a period of three hundred weeks, said \$7.50 to be apportioned as follows: to the said mother, \$1.875; to the said father, \$1.875; and to

John De Pasquale, as father and next friend of the two minor children, for their benefit, \$3.75; the weekly payments to date from Nov. 16, 1912.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 591.

CHARLES SHAW, *Employee*.

BAY STATE STREET RAILWAY COMPANY, *Employer*.

MASSACHUSETTS EMPLOYEES INSURANCE ASSOCIATION, *Insurer*.

HARRY H. NEVERS, M.D., *Physician*.

REASONABLE FEES UNDER THE WORKMEN'S COMPENSATION ACT. COMMITTEE DECIDES THAT THE FACT THAT THE SERVICES WERE RENDERED IN AN INDUSTRIAL CASE AND THE FINANCIAL STATUS OF THE EMPLOYEE AND HIS FAMILY SHOULD BE CONSIDERED.

The employee received a personal injury which necessitated an operation for the radical cure of hernia, and the physician who performed the service rendered a bill for \$100. The insurer refused to pay the fee on the ground that it was unreasonable. The advisory committee of physicians, aiding the Board, expressed an opinion that \$50 was a reasonable compensation to the claimant, in view of the fact that it was an industrial case, and considering the financial status of the employee and his family.

Held, that \$50 was a reasonable fee for the service.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Harry H. Nevers, M.D., v. Massachusetts Employees Insurance Association, this being case No. 591 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of David T. Dickinson of the Industrial Accident Board, chairman, Arthur H. Cutter, M.D., for physician, and Morrill A. Gallagher, Esq.,

for insurer, heard the parties and their witnesses in the Hearing Room, Court House, Lawrence, Mass., on Wednesday, Dec. 17, 1913, at 10.30 A.M.

This is a proceeding brought by Harry H. Nevers, M.D., of Lawrence, to recover his bill for medical services rendered to said employee by reason of injuries alleged to have been received by him arising out of and in the course of his employment. The alleged injuries were the aggravation of two hernias which previously existed. The medical services consisted of a surgical operation in which an inguinal and an umbilical hernia were operated on. Claimant was employed as a physician by the injured employee, it not appearing that any physician was provided for him by the insurer under the exigencies. All medical bills for nursing, administering ether, etc., with the exception of the claimant's bill, have been paid by the insurer. A sum of about \$30 has been paid by the employee to the claimant, who was his family physician, for other medical services independent of this injury. Compensation has been previously paid by the employer to said employee by agreement with the insurer, and a settlement receipt taken. It appeared from the evidence that only one of the hernia operations was made necessary by the injury, the operation on the other being made at the same time by reason of convenience and good judgment. The advisory committee of physicians, aiding the board, expressed an opinion that \$50 was a reasonable compensation to the claimant for his medical services necessitated by the injury, in view of the fact that it was an industrial case, and considering the financial status of the employee and his family.

The committee heard the claimant and two other physicians called by him, who advised that the charge of \$100 for the operation on both hernias was reasonable, and in fact below the scale of rates established by physicians in Lawrence. In view of the fact that this was an industrial case, and that the aggravation of one hernia only was due to the injury, the committee finds that \$50 should be allowed the claimant as a reasonable compensation for his medical services arising out of the injury.

DAVID T. DICKINSON.

MORRILL A. GALLAGHER.

CASE No. 593

WILLIAM BRENNAN, *Employee*.

WESTERN MASSACHUSETTS CONTRACTING COMPANY, *Employer*.

TRAVELERS INSURANCE COMPANY, *Insurer*.

EMPLOYEE IS INCAPACITATED FOR ALL WORK EXCEPT THAT OF FOREMAN, AT WHICH HE WAS EMPLOYED AT THE TIME OF THE INJURY. COMPENSATION DUE ON THE BASIS OF HIS PRESENT EARNING CAPACITY.

The employee, a foreman, received a personal injury arising out of his employment, by reason of which his right hand was crushed, the first and second fingers severed, and the hand otherwise so mutilated that it will never be useful. The evidence showed that practically the only work which he could do was that of foreman, the position which he held when he was injured, and which he again hopes to obtain when the contracting business improves. Because of the injury to his right hand the employee cannot find employment as a blacksmith, his previous occupation; nor has he been able, by reason of the injury, to obtain any other work.

Held, that the employee is entitled to compensation on the basis of total incapacity for work.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of William Brennan v. Travelers Insurance Company, this being case No. 593 on the files of the Industrial Accident Board, reports as follows:—

The arbitration committee, consisting of Edward F. McSweeney, chairman, representing the Industrial Accident Board, Charles H. Pease, representing the employee, and Judge Bart Bossidy, representing the insurer, heard the parties and their witnesses in the Selectmen's Room, Town Hall, Lee, Mass., Monday, Dec. 22, 1913, at 2.15 P.M.

The agreed facts in this case are as follows: William Brennan, age forty-four years, single, time worker, at wages of 40 cents an hour, was employed as a foreman for the Western Massachusetts Contracting Company, who are insured in the Travelers Insurance Company. On Sunday, Nov. 17, 1912, at 4.30 A.M., a train crew under the direction of Mr. Brennan was making up a train to haul ballast. Mr. Brennan signaled the engineer to back up to couple cars, and in doing so his

right hand was crushed between the couplings, the first and second fingers being amputated, the hand otherwise being left so mutilated that it will never be useful.

During the interval between the date of the accident and May 17, Brennan returned to work, but was obliged, on account of the condition of his hand, to give up any further attempt to labor after two weeks' trial. By agreement between the injured man and the insurance company the amount of time Brennan worked was deducted from his compensation. The only controversy before the arbitrators is as to whether Brennan is entitled to partial or total disability compensation after September 16, when Brennan got through with the Carter Contracting Company.

It appears that on May 17, to which time compensation was paid in full, Brennan secured a position as foreman with the Carter Contracting Company, at which occupation he was employed until September 16, when he lost his employment because this contracting firm had concluded its work on this particular job. The claim is now made by the insurance company that inasmuch as Brennan acted in the capacity of foreman from May 17 until September 16, and as such received his former rate of wages until his employment ceased for want of work and not for any reason growing out of the disability, this is evidence that disability from the injury ceased on May 17, and that Brennan's failure to get work since September 17 is due to the condition of the labor market as regards foremen, and not because of any disability resulting from the loss of his fingers and the total loss of the use of his hand.

The arbitrators find from the testimony that prior to Brennan's being engaged as foreman he was a blacksmith by occupation; and while the evidence shows that his promotion was partially, at least, due to the friendship of the employing contracting company, there is no evidence that he did not perform his work as foreman in a satisfactory and proficient manner.

After May 17, when Brennan went to work for the Carter Contracting Company, he acted as foreman, a position which he could hold without any necessity for using his right hand.

He received the regular wage of a foreman. When the Carter Contracting Company finished this job on September 17, Brennan was not able to be of further use to them, and his employment was terminated. He subsequently tried to get employment as a foreman in various places in Massachusetts, New York and Connecticut and failed. If he had had two hands he would have immediately gone back to work as a blacksmith, his regular occupation, and received 25 to 35 cents an hour. Due to his injury he did not seek employment as a blacksmith.

Examination of Brennan's hand by the arbitrators shows that Brennan is totally and permanently incapacitated for any labor requiring two hands. He testified that he was unable to hold a knife or fork in his right hand, and has to eat with his left hand.

The evidence further shows that practically the only work which Brennan can now do is such a position as that of foreman, which he held when he was injured, and which he again hopes to receive when the contracting business starts up again. The condition of the labor market may affect Brennan's ability to get employment as a foreman, but it is the injury to his major hand which prevents his doing work at his former trade as a blacksmith, and has substantially closed to him the door of a great majority of all employments. But for the injury to his hand when Brennan's employment as a foreman ceased, he would have sought immediately and probably readily obtained employment as a blacksmith. With the limitations due to his injury, however, the only employments open to him, other than as foreman, are those in which the work can be done by a man who has lost his major hand, such as a watchman, flagman, etc., — occupations limited in number and low in wage.

Under the circumstances the arbitrators find that William Brennan, as the result of an injury arising out of and in the course of his employment, is totally incapacitated for labor, and is entitled to total disability at the maximum rate of \$10 a week from September 16 to December 22, and to continue for an indeterminate period.

The arbitrators find that the Travelers Insurance Company

owe Brennan for total incapacity to labor, due to an injury arising out of and in the course of his employment, the sum of \$138.57 for a period of thirteen and six-sevenths weeks, at the rate of \$10 a week, that is, from September 17, when the insurance company ceased paying compensation, to Dec. 22, 1913, the date of the arbitration hearing; and that the Travelers Insurance Company shall continue to pay Brennan at this rate until he returns to work at his former occupation as foreman, or if in some other occupation paying less wages than he received at the time of his injury, the partial disability due him shall then be determined in accordance with the provisions of the law.

EDW. F. MCSWEENEY.

CHARLES H. PEASE.

BART BOSSIDY.

My agreement to this finding is upon my understanding of the evidence that Brennan secured and retained his employment with the Carter Contracting Company, not because he was physically fit to perform the usual and regular duties of a foreman, but on account of the preference shown Brennan by the Carter Company due to personal friendship; that he would have been unable, and was unable, after honestly attempting, to perform the usual duties of a foreman under usual conditions; that his employment by the Carter Company was unusual and would not obtain except for personal reasons and preference as testified to; that the injury complained of was the cause of his inability to perform the usual duties as foreman.

BART BOSSIDY.

CASE No. 595.

JOHN J. LYNN, FATHER AND DEPENDENT OF JAMES F. LYNN,
Employee.

BENJAMIN FOX, INC., *Employer.*

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., *Insurer.*

FATAL INJURY TO EMPLOYEE WHICH OCCURS WHILE SAID EMPLOYEE IS ON THE PREMISES OF THE SUBSCRIBER FOR PURPOSES OF HIS OWN DOES NOT ARISE OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

The evidence showed that the employee received a personal injury while he was in the building which his employer had contracted to construct, but that his employment status was not in effect at the time, the said employee having visited the building for purposes of his own, and not being engaged in the work of his employer at the time the said injury occurred.

Held, that the injury did not arise out of and in the course of his employment.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings and decision of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of John J. Lynn, father and dependent of James F. Lynn, *v.* Employers' Liability Assurance Corporation, Ltd., this being case No. 595 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of James B. Carroll of the Industrial Accident Board, chairman, Daniel E. Irwin, 6 Beacon Street, Boston, representing the employee, and W. Lloyd Allen, Shawmut Bank Building, Boston, representing the insurer, heard the parties and their witnesses at the Hearing Room of the Industrial Accident Board, Pemberton Building, Boston, Mass., on Friday, Dec. 19, 1913, at 10 A.M. Lester W. Cooch, Esq., appeared for the employee, and John M. Morrison, Esq., appeared for the insurance company as counsels.

It is agreed that if the father is entitled to compensation it will be at the rate of \$3 per week, and the insurance company has paid nine weeks. The only question in this case is whether the injury arose out of and in the course of his employment.

Patrick Casey, 745 East Fifth Street, South Boston, testified: —

I was employed by the Fox Company on July 30, 1913, as foreman at the warehouse of the Cordage Company at Plymouth. James Lynn was a cement finisher. There is no limit to our work when we are laying floors. We sometimes work two and three nights without sleep. Benjamin Fox Company at this time was working on two jobs at Plymouth, the cordage tenements and the cordage warehouse. Mr. Payson was superintendent of both jobs, which were about one quarter to one-half mile apart. On Monday morning, Lynn worked at the warehouse, and in the afternoon he went to work at the tenements. Monday night he did not work for me. Tuesday Lynn went to the tenements and worked there until 6 o'clock that night. Tuesday night it started to rain, and when it rains the men cannot work on the cement, although the cement hardens just as much. Early Wednesday morning, about 3 o'clock, the rain had stopped and Lynn was called to go to work on the warehouse, and remained there from 3 to 7 o'clock in the morning. That day he worked at the tenements. That night, Wednesday, at supper, I told him to come around about 9 or 10 o'clock to help the boys out, as they were pretty tired. He was coming to work when he fell in the hole, at 10.30 o'clock that night. The men were working about 150 feet away from the place where he was injured. There was a run in the center of the building up which every one came to enter the building. The only light in the building was where the men were working, and this place was lighted by gasoline torches. I went down to get more torches and heard some one groaning and calling my name. I went over and saw Lynn down in the hole, so called to the boys and we went down to get him. I found a couple of broken bottles and one or two bottles filled with beer. All the boys drink beer. In order to reach the men Lynn was following the wall, navigating towards where the men were working. The floor was laid, but there were forms upright from the floor about 10 or 11 feet, and 3 or 4 feet apart in a straight line, so that a man walking along could not see; and as Lynn was unfamiliar with this building he kept close to the wall, trying to get to the men. The building is about 400 feet long. Lynn was perfectly sober and had on his working clothes, but did not have on his overalls.

John J. Lynn, father of James Lynn, testified: —

I did not see my son between the time of the accident and the time he died, but my wife did.

Fred Payson testified: —

I was the superintendent for both the tenement and the warehouse jobs, and the distance between them was about ten minutes' walk. Lynn had

been working for me about a week. Casey was the cement finisher foreman and had charge of all cement finishers. As Mr. Casey stated, on account of the rain which held back the work he had put Lynn on about 3 o'clock Wednesday morning to help him along. Lynn worked ten hours on the tenements that day and had no work Wednesday night. There was 4,000 feet of floor to be finished, and each man can take care of 1,000 feet, and there were four or five men on the job. I did not know of any occasion for extra men. I did not know about the accident until the next morning, and as I understood it this man fell through the hole and was in a very critical condition. I went right to the building and saw Mr. Casey and asked him what Jimmy was doing that time of night and how he happened to be on that side of the wall; and as I understood it, he just came down to see the boys. This building was 400 feet long and 100 feet wide, and on the floor there were columns every 20 feet and girders coming right through. I cannot see why a man should go in the direction Lynn took. I did not hear anything about the beer this day, but heard about it later. I was feeling quite badly over the man being killed on the job and Dr. Bruce called me and said, "You need not feel so badly. Mr. Lynn told me that he went back to get some beer and in going back fell into the hole and broke his back."

Patrick J. Walsh, a cement finisher, testified: —

I worked for the Fox Company, and in the gang working for foreman Casey. I went to work Wednesday night at 7 o'clock and worked until some time next morning. I did not see Lynn on the job that night, but saw him after he fell. He was in his working clothes, but did not have his overalls on. There was no work a man could do in that part of the building where Lynn was working. I do not know what he was doing there that time of night.

Mr. Cooch agreed to Mr. Morrison submitting the following statement made to him by Dr. Bruce of Plymouth: —

Dr. Bruce told me that Mr. Lynn told him he had gone over there to get some beer and some light lunch.

On this evidence we find that James F. Lynn at the time he met his death was not engaged in the work of his employer, but visited the building for a purpose of his own, and we rule that the injury and death did not arise out of and in the course of his employment, and that the father, John J. Lynn, is not entitled to compensation under the Workmen's Compensation Act.

JAMES B. CARROLL.
W. LLOYD ALLEN.
DANIEL E. IRWIN.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties and their witnesses at the Hearing Room, New Albion Building, Boston, Mass., on Friday, May 1, 1914, at 10 A.M., and affirms and adopts the findings and decision of the committee of arbitration.

The evidence submitted was substantially the same as that presented to the committee of arbitration, no evidence being introduced to show that the injury to the employee, James F. Lynn, arose out of and in the course of his employment.

The evidence showed that the said employee received the personal injury which caused his death while he was in the building which his employer had contracted to construct, but that his employment status was not in effect at the time, the said employee having visited the building for purposes of his own, and not being engaged in the work of the employer at the time said injury occurred.

The Industrial Accident Board finds upon all the evidence that the injury did not arise out of and in the course of the employment of the said James F. Lynn, and that the father and dependent, John J. Lynn, is not, therefore, entitled to compensation under the statute.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 600.

FRED STEINER, *Employee.*

STANDARD OIL COMPANY OF NEW YORK, *Employer.*

CASUALTY COMPANY OF AMERICA, *Insurer.*

COMPENSATION AWARDED EMPLOYEE WHO RECEIVED INJURY
WHILE ASSISTING INDEPENDENT CONTRACTOR.

The employee received a personal injury while assisting an independent contractor, and the insurer claimed that he was not entitled to compensation because he was the servant of the said independent contractor at the time he received

the injury. The evidence showed that he had been assigned by the subscriber to assist the contractor, and that his status of employment had not been changed by reason of this assignment.

Held, That he was an employee of the subscriber and entitled to compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Fred Steiner v. Casualty Company of America, this being case No. 600 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of James B. Carroll of the Industrial Accident Board, chairman, James McGowan, 141 River Street, North Adams, representing the employee, and Park G. Canedy, East Main Street, North Adams, representing the insurer, heard the parties and their witnesses at the Aldermanic Chamber, City Hall, North Adams, Mass., on Friday, Jan. 16, 1914, at 12.30 P.M. Francis W. Cassidy, Esq., of Adams and Charles H. Wright, Esq., of Pittsfield appeared as counsels for the employee and insurance company, respectively.

There was no dispute about the injury or wages. It was claimed by the insurer that the employee was not in the employ of the Standard Oil Company when injured, but was the servant of the contractor.

T. J. Gendron of North Adams testified: —

I am the local agent for the Standard Oil Company in North Adams. On Sept. 4, 1913, Fred Steiner was in my employ and I had hired him. He had been working for me about twenty-two or twenty-three days at the time of the accident, and I hired him to help with the other men, — to help build foundations and any other work to be done down there, and he with the other men built the foundation for the tank. At the time of the accident he was helping the men to take in the ropes on this tank when one of the cables gave way, the tank came down, hurting Mr. Steiner and another man. Steiner was under Mr. Flynn, my foreman. His average weekly wages were \$10.50 per week. I believe he hurt his hips badly as far as I can learn. At the time he was injured a tank was being erected by a contractor from Boston, under a contract with the Standard Oil Company to put it up, and this contractor came to North Adams and hired men to assist him in putting up the tank. Steiner was working for me. He was hired as a general laborer, and did the

same work as the other men, anything that had to be done, sometimes shoveling gravel, handling lumber, and any odd jobs I had to be done there. The tank was in the yard and in our way, and I instructed all the men to help the contractor, in case the contractor needed any help, to get it out of the way so as not to have the yard tied up, which would tie up deliveries. I instructed Steiner personally and also instructed the foreman. When the tank was delivered it was not in my way, but was after they started to put it up. This tank was about 25 feet long, 10½ feet in diameter and weighed about 9 or 10 tons. Steiner was holding the ropes when the cable gave way. This cable belonged to the contractor, and I think he got it from a local contractor here, but do not know for certain, as I was not there when he got it. He brought some apparatus from Boston, and what he did not have I loaned him. I had ropes, tackle and machinery down there. The contractor had been there some two or three days before the accident, and about a week in all previous to that. Steiner was in my employ at all times down there. There is positively no question about this man being on my pay roll. The tank was simply to be put on end. There were two of my men helping this contractor that I know of, Mr. Connell and Mr. Steiner. The contractor on this particular occasion did not ask me for men. He asked me for a horse to help him raise the tank, and I told him I was short of horses.

Dr. William F. McGrath, physician and surgeon in North Adams, testified: —

I had a telephone call and went immediately to the Standard Oil Company's works and found two men, one unconscious and the other one, Steiner, nearly so, in a semicomatose condition. Steiner received a crushing injury to the hip and some internal injuries, to the kidneys particularly. There were no bones broken. His back almost to the shoulder was discolored very badly, but this did not show until the third day after the accident. Later on his abdomen swelled quite a little, but subsided after some hot packs had been applied, and after he had expelled quite a little blood from the bladder. I have been attending him since the accident — in the last month about once a week, and he still has some bladder trouble. His limb seems to be more or less dead. By the crushing he received, he injured the nerves and joints, and is not able to work now. It looks to me as if he will never be able to do very much. His system is more or less run down from this injury and from the fact that he has been tied up in the house all this time. I have not yet rendered my bill for services. He was in the hospital from September 4 to November 26. I have known the man for quite a long time, not intimately, and have examined him on several occasions for insurance policies, and he always appeared to be a very rugged man.

The insurer requested the following instruction: "That on all the evidence in the case, the employee is not entitled to recover compensation."

On this evidence we find that Fred Steiner when injured on Sept. 4, 1913, was in the employ of the Standard Oil Company of New York, and that he is entitled to hospital and medical services for the first two weeks following the injury, that is, from September 4 to September 17, inclusive, and to compensation based upon one-half his average weekly wages, that is, one-half of \$10.50, \$5.25, beginning the fifteenth day after the injury, Sept. 18, 1913, and to continue during his total incapacity for work.

This decision and all findings regarding compensation or the existence or termination of incapacity, are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III., of the Workmen's Compensation Act, and the general provisions of said act and its amendments.

JAMES B. CARROLL.
JAMES MCGOWAN.

Park G. Canedy dissents.

CASE No. 605.

CHARLES W. DUCY, *Employee*.

FALL RIVER BLEACHERY, *Employer*.

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, *Insurer*.

SIGNING OF SETTLEMENT RECEIPT DOES NOT BAR PROCEEDINGS BY EMPLOYEE TO DETERMINE HIS RIGHT TO REIMBURSE- MENT ON ACCOUNT OF EXPENDITURES FOR MEDICAL SERVICES.

The insurer claimed that the signing of a settlement receipt by the employee barred him from asking for a hearing before a committee of arbitration because of its refusal to reimburse him on account of his outlay for medical services.

Held, that the signing of a settlement receipt did not prevent the employee from asking for a hearing, and that the employee was entitled to reimbursement on account of his payment for medical services, the insurer not having furnished such services.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Charles W. Ducy v. American Mutual Liability Insurance Company, this being case No. 605 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Joseph A. Parks, representing the Industrial Accident Board, chairman, Thomas D. Sullivan, Esq., of Fall River, representing the employee, and John C. Crawford of Fall River (appointed by Mr. Parks to represent the insurer, the latter having declined to name a representative), heard the parties and their witnesses at Room 35, City Hall, Fall River, Mass., Friday, Feb. 27, 1914, at 11 A.M.

Charles Ducy, employed as a calendar man by the Fall River Bleachery, on Sept. 4, 1913, while stepping over a bench, caught his foot on the edge of the bench and sprained his ankle. He called Dr. Jeremiah J. Lowney on September 6 to treat the ankle, and a bill, amounting to \$18, was tendered for medical services to and including September 17, which the insurer refused to pay, claiming that medical attendance was provided for injured employees at the Union Hospital, Fall River, by the company, and that a settlement receipt in regard to compensation had been signed by the employee and compensation paid in accordance with the provisions of the Workmen's Compensation Act.

Orton A. Peck, Esq., for the insurer, stated that his company claimed that a committee of arbitration has no jurisdiction in the matter of the payment of a physician's bill for services rendered an injured employee, provided a settlement had been made with the employee regarding compensation. In support of its contention, the insurer relies upon section 5, Part III., giving jurisdiction to a committee of arbitration in cases where the employee and the insurer have failed to reach an agreement, and section 16, Part II., giving jurisdiction to the Industrial Accident Board, in which no mention is made of a com-

mittee of arbitration. On the ground of this construction, the insurer declined to take any part in the hearing. Mr. Peck further stated that the bill of the physician, as tendered, was considered fair and reasonable.

Cornelius W. Donovan, Esq., attorney for Dr. Lowney, contended that the medical attendance during the first two weeks after the injury is as much a part of the compensation as the money paid in the case, and that it is the intent of the act that all such disputes between the injured employee and the insurer shall be adjusted, if possible, by arbitration. He stated that in this case the injured man had not been proffered any medical attention at the time of the injury, and had been obliged to call in a physician himself, who treated him continuously for the period provided for in the act and tendered a bill of \$18, which the insurer refused to pay. He claimed, therefore, that the payment of the physician's bill, in dispute, was a matter upon which a committee of arbitration should have jurisdiction.

Mr. Parks explained that, although the insurer laid particular stress upon the fact that an agreement for settlement as to compensation had been reached, section 20 of Part II. of the act, providing that "no agreement by an employee to waive his rights to compensation under this act shall be valid," would make null and void such agreement, if it were shown that the employee had been deprived of any of his rights under the act, and that the employee is entitled to two weeks' medical attention. As the insurer has refused to pay the physician's bill for services covering that period, and the matter has been brought forward under section 5, Part III., which provides: "If the association and the injured employee fail to reach an agreement in regard to compensation under this act, either party may notify the industrial accident board, who shall thereupon call for the formation of a committee of arbitration," it is evident that the employee and the insurer have failed to reach an agreement, and that the employee appeared to be within his rights in requesting arbitration. The committee unanimously decided that it had jurisdiction.

Charles W. Duce testified that on the morning of Thursday, Sept. 4, 1913, at 6.30 o'clock, he was going towards his machine

when he tripped over a bench and injured his ankle; that he went to his machine and worked for about an hour, when he told his overseer, Mr. Smith, that he had had an accident and did not know whether his ankle was sprained or broken, as it was swelling all the time, and that he would have to go home. Mr. Smith told him that he had better go back to work, as he could not spare him. Mr. Ducy answered that if he "could not go by asking he would have to go without," as he could not stand it. He said he took his shoe off, and the boss told him that there was something up in the office — he did not know what it was for, but did not offer to help him any. About 9.30 he went home, and no offer was made to send him home or to the hospital, and he walked all the way home, about a mile and a half, and it took him an hour and a half to get home. When he arrived his wife bathed his ankle in hot water, and he thought he would wait awhile to see if they would send anybody from the bleachery. They did not, so on Saturday morning he telephoned for Dr. Lowney, who came and attended him. He was laid up for nearly six weeks, the doctor attending him constantly, even up to the present time. The doctor had tendered him his bill for the first two weeks, and he had given it to Mr. Peck.

Jeremiah J. Lowney, M.D., of Fall River, testified that he saw the injured man two days after the accident, on Sept. 6, 1913, and that he made one visit every day until the thirteenth day of September, and that Mr. Ducy made two calls at his office. The injury was a sprained ankle, with more or less of a hemorrhage, the lower part of the foot being black and blue. It had to be bathed frequently to reduce congestion and relieve the swelling. He had tendered a bill for visits on September 6, 7, 8, 9, 10, 11, 12 and 13, at \$2 per visit, and for calls at his office on the 15th and 17th, at \$1 per visit, amounting to \$18. He knew that Mr. Peck had received his bill, because Mr. Peck told him that Mr. Ducy had presented his bill to him.

The committee of arbitration finds upon this evidence that the insurer did not furnish medical services to the employee, as required by section 5, Part II., of the act, and that there is due, therefore, to the said employee, on account of medical

services rendered by Dr. Jeremiah J. Lowney, the sum of \$18, said services being necessitated by the injury received on Sept. 4, 1913, and the fee for these services being reasonable.

JOSEPH A. PARKS.
THOS. D. SULLIVAN.
JOHN C. CRAWFORD.

CASE No. 606.

MANUEL OLIVEIRA, *Employee*.
MASSASOIT MFG. COMPANY, *Employer*.
ÆTNA LIFE INSURANCE COMPANY, *Insurer*.

PERSONAL INJURY NOT CAUSED BY REASON OF THE SERIOUS
AND WILLFUL MISCONDUCT OF A PERSON EXERCISING
SUPERINTENDENCE.

The employee claimed to have received a personal injury arising out of and in the course of his employment, by reason of the serious and willful misconduct of a person exercising superintendence. The evidence showed, however, that the belt had not broken frequently as claimed, that it was not defective, and that it was made of good material.

Held, that the employee was not entitled to double compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Manuel Oliveira v. Ætna Life Insurance Company, this being case No. 606 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of Joseph A. Parks, chairman, representing the Industrial Accident Board, John W. Coughlin, M.D., 399 North Main Street, Fall River, representing the employee, and Robert A. Dean, Granite Block, Fall River, Mass., representing the insurer, heard the parties and their witnesses in the Committee Room, No. 35, City Hall, Fall River, Mass., Friday, Dec. 19, 1913, at 11 A.M.

David F. Slade, Esq., represented the insurer and employer and John A. Kerns, Esq., appeared for the employee.

Mr. Slade stated that compensation had been offered the

injured employee, but he had declined to accept it, claiming double compensation under section 3, Part II., and alleging serious and willful misconduct on the part of a person exercising powers of superintendence.

It was agreed that Manuel Oliveira, the employee, received a personal injury arising out of and in the course of his employment, by reason of a blow from a broken belt on Aug. 17, 1913, said belt striking him in the right eye, cutting the eyeball and destroying his vision. The left eye was uninjured. His average weekly wages were \$7.83.

Manuel Oliveira testified that he worked for the Massasoit Mfg. Company, and on Aug. 18, 1913, was working on a machine operated by a belt which passed cotton to the cards. He had been working on the machine six months, and the belt had broken at least ten times if not more within that time. Antone Medeiros was his boss or second hand, and all the orders he received were through him. He told Mr. Medeiros every time the belt broke. On the 16th of August, just before he hurt his eye, he was hurt by the same belt, and he told Mr. Medeiros at that time that the belt was no good and not fit to use on a machine; that it was rotten. Mr. Medeiros then said that he had asked the boss for a new belt, but the boss would not give it to him, so Mr. Medeiros and another man took the belt upstairs and mended it. After he was hit in the eye with the belt he talked to Mr. Medeiros twice. The belt usually broke in the same place. Antone Medeiros had given him soap to put on belt and had never told him not to use it. The belt was about 20 feet long and was used on a machine which discharged dust into the yard.

Frank Raposa, 184 Cory Street, Fall River, Mass., a friend of the injured man, testified that Antone Medeiros told him he had gone to the boss and asked for a new belt, and the boss refused to give it to him, simply giving him a new piece to put in. Raposa was not a fellow workman of Oliveira.

Robert A. Thompson, working in various capacities for the Lincoln Mfg. Company, testified that he had seven years' experience as superintendent in one of the other plants, and at the time of the injury to Manuel Oliveira was acting superintendent for ten days. The machine which the injured man

used was a Burr Picker, and the belt was about 30 feet long. To his knowledge there was only one accident in the ten days he was there, and all accidents were reported to him immediately. If the belt had broken ten times within six months he certainly would have replaced it.

Walter S. Richmond, superintendent of the Eddy Mill for ten years, testified that he went frequently in and out of the room in which Oliveira worked on the Burr Picker machine. He did not think that the belt had broken ten times within six months, but it might have. When a belt is mended with a clasp it is stronger than when mended by sewing or cementing. This particular belt was about 20 or 30 feet long, and had been in service about a year. That length of service would give it a 5-inch stretch. He did not see any necessity for belt breaking near clasp any more than any other part, and this belt was of the best quality of oak-tanned belting. He never knew this belt was in a dangerous condition, and if a complaint had been made would have looked at it.

James J. McBride stated that he was the overseer in the room where the accident occurred for more than nine years, and that the statement of the employee with reference to the condition of the belt and its repeated breaking was not true. He had instructed Medeiros to inform the employee not to use soap on the belt, it being necessary to ask Medeiros to interpret his instructions. Oliveira had not asked for a new belt so far as he knew. The belt had broken the Saturday before the accident and was repaired by Antone Medeiros. It had only been in use a little over four months and had never broken before that Saturday.

Antone Medeiros, the second hand, testified that the statements made by the employee, Oliveira, were not true, and that no new belt had been asked for. He had instructed Oliveira not to use soap on the belt, and when it broke the last time had carefully repaired it, putting in a new piece of leather about 2 feet long, removing the defective piece.

The committee of arbitration finds that the evidence does not bear out the claim of the employee that he received his injury by reason of the serious and willful misconduct of a person exercising the powers of superintendence. The claim of the

employee that the belt had broken ten times within six months, and that he had repeatedly warned his second hand, Medeiros, that the belt was rotten and unfit for use, is not borne out by the testimony, there being no corroborative evidence on any point that would permit the committee to find that the subscriber, or a person exercising superintendence, was guilty of serious and willful misconduct.

We find no evidence that there was any misconduct on the part of the employer or his representative, nor can we find that the injury was in any sense attributable to the deliberate and willful act of any person. The loss of the eye is a serious mishap, but its loss was an accidental occurrence, resulting from the natural hazard of the employment, and for which compensation is due and is accordingly awarded the employee under the particular provisions of the law applicable.

We find, therefore, that there is due the employee from the insurer additional compensation for the loss of the eye, fifty weeks at \$4; compensation on account of total incapacity for work, beginning on Aug. 30, 1913, the fifteenth day after the injury, and continuing weekly at the rate of \$4 per week for an indeterminate period, in accordance with the provisions of the act; and a reasonable allowance for medical services during the first two weeks after the injury.

This decision and all findings regarding compensation or the existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III., of the Workmen's Compensation Act, and the general provisions of said act and its amendments.

JOSEPH A. PARKS.
ROBERT A. DEAN.
JOHN W. COUGHLIN.

CASE No. 616.

BRIDGET McELLIGOTT, WIDOW, AND EDWARD McELLIGOTT,
MINOR SON, ALLEGED DEPENDENTS OF PATRICK Mc-
ELLIGOTT, *Employee.*

RODNEY WALLACE, *Employer.*

FRANKFORT GENERAL INSURANCE COMPANY, *Insurer.*

DEATH OF EMPLOYEE BY CANCER NOT DUE TO PERSONAL IN-
JURY. DEPENDENT APPEALS TO SUPREME JUDICIAL COURT.

The weight of the evidence before the committee of arbitration showed that the employee was predisposed to the coming of a gastric cancer, and that the blow received from the timber contributed as a cause of its coming when it did, either through physically disturbing an ulcerous condition, or by weakening his power of resistance, so that it eventually caused his death.

Held, that the employee's dependents were entitled to compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board, rehearing the medical evidence, finds and decides that the death of the employee from cancer was not due to the injury.

Appealed to Supreme Judicial Court.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Bridget McElligott and Edward McElligott v. Frankfort General Insurance Company, this being case No. 616 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of David T. Dickinson of the Industrial Accident Board, chairman, Jeremiah H. Kelliher, Esq., of Fitchburg for the employee, and Horace G. Pender, Esq., of Boston for the insurer, heard the parties and their witnesses in the Aldermanic Chamber, City Hall, Fitchburg, Mass., on Monday, Feb. 2, 1914, at 11.15 A.M.

The committee finds that on April 12, 1913, said employee, a man fifty-three years of age, received an injury arising out of and in the course of his employment. He was hit by a plank or timber about 5 feet in length by 4 by 4 inches, which slipped from the floor above, striking him squarely on end in the small of the back. The timber was used to fasten a trap door, and fell by accident through said door. He was assisting in hauling

stock to the floor above with a chain elevator at the time of the injury, and was at the time attaching a chain to some bags. His average weekly wages at the time of the injury were \$15. He was taken to his home in a carriage and confined to his bed for about two weeks. He had worked for this employer previous to this injury for about twenty-seven years, during which time he had been a hard and steady physical worker, apparently in good health, with but few absences from his work on account of illness. It appeared, however, that he had been somewhat troubled by indigestion or dyspepsia for about fourteen years before the accident, but that he had not complained of such trouble during the year previous. During the two weeks following the injury he suffered pains and soreness both in the back, front and throughout the body, and was so prostrated thereby that his appetite for food was very slight and he took only liquid or soft nourishment. He then gained in strength somewhat, ate moderately of the ordinary household food, including some meat. His back and side were bandaged and he desired to return to work. On April 28 he returned to his place of business and undertook and was given some light work. A short time after he began this light work a falling bale of cotton hit him a glancing blow on the neck and shoulders, not, however, knocking him down or incapacitating him for work for any time. He did not regain his former appetite or strength, and on June 16, 1913, gave up work again. He did not work from June 16, 1913, to July 6, 1913, inclusive. He then returned to work and continued until Sept. 16, 1913, when he was obliged to give up again. During this time, from June until September 16, he was losing weight and eating only moderately, having never regained his former appetite since the injury from the timber, and food commenced to give him pain and distress in the act of swallowing. This loss in weight and pain and distress in the act of swallowing thereafter steadily continued and progressed until he underwent a surgical operation at the Massachusetts General Hospital on Oct. 18, 1913. This operation disclosed a cancer at the cardiac end of the stomach. There was also disclosed a scar formed and left by an ulcer in the duodenum, that is, in the first part of the small

intestine near the outlet of the stomach. He died as a result of a cancer on Dec. 8, 1913.

Dr. Edward J. Tully of Fitchburg, called by the claimants, testified that he treated the employee during the first two or three weeks after the accident, and again in June after his second abandonment of work, and was of the opinion that death was due to a gastric cancer; that such cancers formed in and grew out of gastric ulcers; that the old ulcer scar found in the duodenum showed that the employee was disposed to such ulcers and the likelihood to a cancer starting therein; and that in his opinion the severe blow in the back from the timber, and the ensuing violent shock throughout the body, was a contributing and the aggravating factor in starting into activity the gastric cancer which caused the employee's death. He testified that he had had some medical experience in dealing with cancers and had made some study thereof, but had made no deep medical research in the subject.

Dr. G. P. Norton of Fitchburg, also called by the claimants, testified that he treated the employee some time before he went to the hospital, in August and September, and that he advised him to go to the hospital for treatment. Dr. Norton testified that he had made a special study of cancer and had pursued such study at the New York Skin and Cancer Hospital. He testified that it was his positive opinion that the blow and injury from the falling timber was a contributing and aggravating factor and cause of the cancer starting into action, which caused the employee's death, and that if the employee had not met with this accident it was indefinite and uncertain if and when such a cancer might have later caused his death; that the blow, in his opinion, materially accelerated the time of the employee's death, and that the employee was probably predisposed to death by gastric cancer, as indicated by the old gastric scar found in the duodenum; that the blow from the timber in the employee's back would probably transmit its force to the opposite parts of the body, including the stomach. He testified as to cases where blows in the back had caused ruptures of intestines in the front of the body. He gave as his opinion that the force of this blow to the employee had denuded the surface of a gastric ulcer with a cancerous tendency, either in the car-

diac part of the stomach where the cancer was found, or in some other part of the stomach, so that it had thereby stirred it into action, thus causing infection in the blood and stomach which then broke out in the cardiac location; or that the effect of the blow on the back and the ensuing prostration had so reduced the power of resistance of the employee that the cancerous tendency in the stomach had stirred up into its fatal action, which otherwise would not then have occurred; and that he further based this opinion on the fact that no active cancer had started during the years previous, when the employee had been predisposed to the same, but upon the sequence of events, commencing with the injury and continuing thereafter to the death.

Dr. Francis D. Donoghue, called by the insurer, testified that he had made special study and research into the subject of cancer both in this country and in Europe, and had professionally treated many such cases as a specialist, and that in his opinion the blow from the timber in no way aggravated or accelerated the coming or action of the cancer which caused the employee's death; that the blow was in no way either a direct or contributing cause to the breaking out of the cancer and the death of said employee; and that in his opinion the employee would have died from cancer at the time he did entirely independently of the injury he received. He testified that the weakened power of resistance caused by the injury might possibly have had some effect in making the employee less able to hold in check his natural tendency towards gastric cancer.

The committee finds on the weight of all the evidence and testimony that the employee was predisposed to the coming of a gastric cancer, but that as shown by his exemption from it during the whole of the fourteen years prior to the accident, when he suffered somewhat from dyspepsia or stomach trouble, his natural vigor and strength was able to resist such tendency; that the blow received from the timber contributed as a cause of its coming when it did, either through physically disturbing an ulcerous condition or by weakening his power of resistance so that its natural check was removed and it then broke out into action and form which caused his death; and that without

such injury his death would not have then occurred or at any other time that appears likely or proximate.

The committee finds that the claimant, Mrs. Bridget McElligott, who is the widow of the deceased and was living with him at the time of the injury, and the claimant, Edward McElligott, who was his son by a former marriage and less than eighteen years of age, and also living with the deceased employee at the time of the injury, are thereby conclusively presumed to be wholly dependent upon the deceased at the time of the injury, and that they are each entitled to a weekly payment of \$3.75 as such dependents for a period of two hundred and sixty-five and five-sevenths weeks from Dec. 8, 1913, said two hundred and sixty-five and five-sevenths weeks being three hundred weeks less the period of thirty-four and two-sevenths weeks, from April 12, 1913, the date of the injury, to Dec. 8, 1913, the date of the death of said employee, December 8 being also the date of the last payment due to said employee during his life. The committee finds further that the deceased was wholly incapacitated for work by reason of the injury from the falling timber for fifteen and two-sevenths weeks, beginning the fifteenth day after April 12, 1913, the date of the injury, said fifteen and two-sevenths weeks including the following: April 26 and April 27, two days; June 16 to July 7, three weeks; September 16 to December 8, twelve weeks; and that there is due to the estate of the deceased for compensation therefor \$114.64, being at the rate of \$7.50 per week for said period of fifteen and two-sevenths weeks; also that Dr. Tully should be paid his reasonable charges for medical services rendered to the deceased during the first two weeks after the injury.

DAVID T. DICKINSON.

JEREMIAH H. KELLIHER.

Horace G. Pender dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties and their witnesses at the Aldermanic Chamber, City Hall, Fitchburg, Mass., on Saturday, May 16, 1914, at 11 A.M., and finds and decides as follows:—

Dr. Edward Tully testified substantially the same as at previous hearing, and his evidence before the committee of arbitration is referred to and made a part of this report.

Dr. G. P. Norton testified that it was his opinion now that the cancer from which the employee suffered existed prior to the injury received on April 12, 1913.

Dr. Timothy Leary, called by the insurer, testified substantially as follows: —

Cancer is a growth of the cells of the body, like any other tissue. It is a fact that cancer grows more rapidly in the young than in the old. In young people with their splendid vitality it grows much more rapidly.

In regard to the traumatic theory of cancer, I have always believed that traumatism was a very important factor, acting in two ways: first, in assisting in the dislocation of these cells, and second, by the increased blood supply furnished in connection with the injury, furnishing these cells with unusual nutrition. The character of the traumatism in the production of a carcinoma must be repeated injuries applied directly to the seat where the cancer grows. There is not only the factor of the displacement of these cells; that alone will not produce cancer. There is evidently necessary other stimulæ, and these stimulæ are furnished by repeated mechanical injuries usually of relatively mild degree. Cancers in the stomach are very common among the Germans. Germans are gross feeders, and the soft membrane at the pyloric end of the stomach is brought into contact with these masses of food. It is in the pyloric end of the stomach that ulcers arise, and ulcers are the common cause of cancers of the stomach. These irritations from food swallowed in this way correspond to traumatism. To form a cancer you have to have the dislocation of the cells from their normal relations, and opportunity for repeated irritations in an uncovered surface. The cardiac end of the stomach is the best guarded structure. It is way up under the ribs. It is impossible to feel a cancer of the cardiac end of the stomach until it gets as big as your fist. This is an unusual type of cancer of the stomach. The common type takes place at the pyloric end of the stomach. Carcinoma is a growth of the cells of the epithelium. There is very little evidence that a single blow ever produced a carcinoma, and what evidence there is definitely related to the point where the carcinoma arose. I absolutely do not believe that a blow on the back such as he received could injure the stomach. In this case there would be some force transmitted to the stomach, but not a great deal. No blow could have been delivered which could have reached where the cancer originated. Indirect violence could not have been great enough to do much harm to his stomach because the stomach is an elastic organ, and you cannot transmit violence to do serious harm unless you crush. Crushing injuries would do so. I think in this case we can eliminate indirect violence of

that sort. An injury sufficient to reach the cardiac end of the stomach would mean crushing of the back bone and ribs, and would necessarily mean violence to other organs.

In regard to the rapidity of the growth of cancer in a man fifty-three years of age, a cancer is not a thing which grows over night. A cancer is a thing which takes months, and, therefore, if we had a definite symptom of loss of weight in a man fifty-three years of age you must trace your cancer back several months. I believe without question that the cancer existed previous to the accident, in view of this fact. The fact that he had difficulty in swallowing in June showed that in a man of his years the cancer had been going on for at least five months, to reach a point where it would obstruct the introduction of food. After the symptoms of obstruction were first noticed, it would be a period of months before the obstruction would be absolute. His obstruction became absolute, as a matter of fact, in five or six months, and that strikes me as being a reasonable progression. A carcinoma at the cardiac end of the stomach cannot be caused or aggravated by a single act of violence.

Dr. Francis D. Donoghue stated that he agreed substantially with Dr. Leary's testimony; that he had made a search of the literature on carcinoma and could not find in literature, in any authority, any case of carcinoma of the cardiac end of the stomach from external violence; that it was impossible to subject the cardiac end of the stomach to injury by external violence unless as described by Dr. Leary; and where the word "traumatism" is used in literature in regard to ulcer of the stomach and carcinoma of the stomach, it refers to internal traumatism, as described by Dr. Leary, to the effect of irritating food or drink, food which has a lot of rough things in it, or taking hot drinks. The word "traumatism" means internal traumatism. Dr. Donoghue expressed the opinion that although the injury did not affect the cancer, it affected the man, and that the accident took some of his support out of him. All the effects fairly attributable to the injury should have ceased within two months after the date of said injury.

The Board finds, upon all the evidence, that the external violence in this case was too remote to be a factor in producing or aggravating a growth located at the cardiac end of the stomach, this portion of the stomach being so protected as to make it improbable that the blow, or injury, such as it is claimed the employee received, caused a condition of cancer. The weight of the evidence shows that, by reason of the early

development of symptoms of obstruction, the growth must have been present at the time of the accident, and that it pursued the usual course of an obstructing cancer in this position. This was shown by the fact that the employee got temporary relief by the making of an opening into the stomach, so that it became possible to give him more nutrition. There was no direct violence over the stomach, or in the region of the growth; therefore direct violence was not a possible factor in the development or acceleration of said growth. The evidence further shows that, so far as the incapacity which may fairly be attributed to the injury is concerned, the employee recovered from the accident on or about June 15, 1913.

The evidence before the committee of arbitration shows that the employee, Patrick McElligott, was not able to earn wages by reason of the total incapacity for work due to the injury on April 26 and 27, 1913, and that no further wages were lost by said employee until June 16, 1913.

The Board finds, upon all the evidence, that all incapacity due to the injury received on April 12, 1913, ceased on June 15, 1913, and that there is due the estate of the employee, Patrick McElligott, a reasonable allowance on account of the medical services rendered by Dr. Edward J. Tully during the first two weeks after the injury, and the payment of two days' compensation on account of total incapacity for work, that is, two-sevenths of \$7.50, or \$2.14.

DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 621.

GEORGE MACDONALD, *Employee.*

LYNN WOOD HEEL COMPANY, *Employer.*

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *Insurer.*

WANT OF WRITTEN NOTICE NOT A BAR TO PROCEEDINGS FOR
COMPENSATION WHEN THE EMPLOYER HAS KNOWLEDGE
OF THE INJURY.

The insurer contends that no written notice of the injury had been given, in accordance with sections 15, 16 and 17 of Part II. of the Workmen's Compensation Act, and therefore that these proceedings could not be maintained. It appeared, however, that the subscriber had substantial knowledge of the injury to such an extent that any reasonable investigation would have revealed all the material facts and conditions pertaining to the case.

Held, that want of a written notice is not a bar to these proceedings.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of George MacDonald v. Fidelity and Deposit Company of Maryland, this being case No. 621 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of David T. Dickinson of the Industrial Accident Board, chairman, Addison M. Goldsmith, Esq., for insurer, and Roy F. Bergengren, Esq., for employee, heard the parties and their witnesses in the Aldermanic Chamber, City Hall, Lynn, Mass., on Monday, Jan. 5, 1914, at 2 P.M.

The above employee on Nov. 1, 1913, received an injury arising out of and in the course of his employment. His average weekly wages at the time were \$13.50. His occupation was operating a machine which grooved the inside of the heels of shoes. While taking a heel form from a box a splinter was forced into the palm of his left hand. This employee was left handed. Blood poisoning ensued; the infection became serious and certain surgical operations were performed therefor at the Lynn Hospital and also by Dr. Gustave Hartman at the Union Hospital. Shortly before the accident the employee had suf-

ferred from a boil on the back of his left wrist, and had been also operated upon for its relief at the Lynn Hospital on Nov. 5, 1913. It was suggested by the insurer, and medical testimony was called in support of the contention, that the infection of the hand was the result of infection from the boil on the back of the wrist. The infected hand was operated upon by Dr. Hartman on November 9, who also continued to dress the same thereafter up to the present time.

It was contended by the insurer that no written notice of the injury had been given to the association or subscriber in accordance with sections 15, 16, and 17 of Part II. of the Compensation Act, and therefore these proceedings could not be maintained. It appeared, however, that the subscriber had substantial knowledge of the injury on November 8, when said subscriber drew up a written notice of an accident by which the employee was injured. This written notice was drawn up by a superintendent of the subscriber after a conversation between said superintendent and employee in regard to his injured hand. At the time of this conversation with the superintendent blood poisoning had developed in the hand, and the employee had been treated at the Lynn Hospital both for the boil on the wrist and also to a certain extent for the blood poisoning in the hand. Knowledge was therefore at this time, November 8, in the possession of the subscriber to such an extent that any reasonable investigation made thereafter by the subscriber or the insurer could have ascertained all material facts and conditions pertaining to the case. The committee therefore finds that the want of a written notice is not a bar to these proceedings for compensation under the act.

The committee finds, on the weight of the medical and other evidence, that the blood poisoning and infection of the left hand was caused by the splinter which was forced into said hand on November 1, and that the employee has been wholly incapacitated for work thereby since, and will continue to be so incapacitated. He will probably be able to resume ordinary work about Feb. 1, 1914, but upon this point the committee makes no definite finding. The committee finds that he is entitled to compensation at the rate of \$6.75 per week from Nov.

15, 1913, the fifteenth day after the injury, during the continuance of said total disability.

There is also due for reasonable medical services furnished on account of said injury the following: to Dr. Gustave Hartman for surgical operation, \$20, and for six dressings, \$12; to Dr. J. H. Grant for administering ether, \$5, a total of \$37 for medical services. There is also a bill from the Union Hospital, Lynn, Mass., for \$7.50.

This decision and all findings regarding compensation or the existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III., of the Workmen's Compensation Act, and the general provisions of said act and its amendments.

DAVID T. DICKINSON.
ADDISON M. GOLDSMITH.
ROY F. BERGENGREN.

CASE No. 622.

GUISEPPE NICOTERO, *Employee*.
PATTEE & POTTER, *Employer*.
GLOBE INDEMNITY COMPANY, *Insurer*.

REFUSAL OF EMPLOYEE TO PERMIT OF PERFORMANCE OF OPERATION FOR REMOVAL OF AFFECTED EYE UNREASONABLE.
INCAPACITY FOR WORK HELD TO BE DUE TO UNREASONABLENESS AND NOT TO THE INJURY.

The evidence showed that the operation offered without cost to the employee by the insurer would cure the condition which caused his incapacity for work, and that said operation would not be attended with danger to life or health. The employee refused to accept the operation.

Held, that the refusal of the employee to accept the operation was unreasonable, and that all incapacity was due to his unreasonableness in refusing to accept the operation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to the Supreme Judicial Court.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Guiseppe Nicotero v. Globe Indemnity Company, this being case No. 622 on the files of the Industrial Accident Board, reports as follows:—

The arbitration committee, consisting of Edward F. McSweeney, representing the Industrial Accident Board, chairman, Edward A. McEttrick, representing the employee, and Ralph W. Stearns, representing the insurer, heard the parties and their witnesses in the Aldermanic Chamber, City Hall, Newton, Mass., Tuesday, Jan. 13, 1914, at 10.30 A.M. F. H. Blackwell, Esq., appeared as counsel for the employee and Howard Sheffield, Esq., for the insurer.

The facts of this case are as follows:—

Guiseppe Nicotero, age twenty-six years, a laborer, digging cellars and doing general work at an average weekly wage of \$12 a week, was employed by Winthrop Pattee and John A. Potter, engaged in real estate and building houses, etc., who are insured in the Globe Indemnity Company. About 3 o'clock in the afternoon on Monday, July 7, Nicotero was picking up stone which other men were breaking with a sledge hammer and wedge, when a chip of steel broke off the sledge hammer and struck him in the left eye, causing an injury, which with secondary changes has produced a disorganized globe resulting in total loss of sight in the injured eye.

The evidence of all the physicians who have examined Nicotero is to the same effect: if the injured eye is not operated on and removed, there is danger of sympathetic ophthalmia of the right eye which may cause him to lose it. There is a chance that the injured eye may gradually shrink up and remain quiet, but it is more likely that if it is not removed it will cause total blindness in the right eye, or at least incapacity to work. At the present time the state of the injured eye, acting on the right eye, makes it impossible for the injured man to work.

Guiseppe Nicotero claimed that his injury was due to the serious and willful misconduct on the part of Pattee & Potter, his employers.

The evidence showed that the hammer from which the chip flew into Nicotero's eye had been in bad condition up to a week before the date of the injury. It was rounded at the edges due to use, and so threw off flakes or chips of steel. About a week before the injury, one Phillippo Gurgone, a fellow employee who could talk English, and because longer employed by this contractor, was used to transfer orders to his fellow employees without occupying the position of foreman, or receiving any more compensation than they did, was told by Superintendent Sanderson to take this particular hammer to the blacksmith shop of Andrew Peters to be tempered and repaired. The hammer was brought back on the morning of this injury and was put into use after 1 o'clock that day, and had not been in use after being repaired for more than twenty minutes when it struck a stone or some hard substance and a chip flew off as described, causing the injury.

The blacksmith testified that the hammer was repaired in the usual manner, and that there was no reason why it was not perfectly safe to be used, and that the chipping off which resulted in the injury to Nicotero's eye was not the result of either poor steel or poor work in repairing, and could not reasonably have been foreseen or anticipated by Pattee & Potter, or anybody exercising for them the power of superintendence.

The arbitrators find, on the preponderance of the evidence, that the claim the injury was due to the serious and willful misconduct on the part of the employer, as provided in section 3, Part II., is not sustained.

Mr. Sheffield, for the Globe Indemnity Company, made the following offer to the arbitrators: that the insurance company would admit that Nicotero's incapacity for labor, as the result of the injury on July 7, still continues, and he is entitled to full compensation of one-half his average weekly wage of \$12 a week since the time of the last payment on the 10th of November up to date, and for such subsequent time as disability continues.

The insurance company claimed that in view of the circumstances in this case, Nicotero, in his own interests, should accept the advice of all the physicians, including his own

physician, and have the injured eye removed. The insurance company agreed that he should be given the privilege of selecting his own doctor, provided that such doctor is competent to perform such an operation; the company will pay the bill for this operation, and continue to pay compensation until he is entirely recovered from the operation, and the other eye is in such condition that he will be able to resume his work.

This offer was communicated to the injured man, as shown by the following transcript of the testimony: —

Q. (by Mr. McSWEENEY). Do you know that if you do not have this eye taken out, and such an operation is not a dangerous one in the sense that it will impair your life, you will become totally blind? A. I can't help it; I don't care.

Q. Do you know that you will become entirely blind, if you do not do as we advise you? A. I don't care.

Q. You do not care whether or not you are blind? A. No; I do not.

Q. What will you do after you have become blind? What can you do? A. I will go home to Italy.

Q. Where will you get the money to go there? You have none now?

A. No; I have none now; if I cannot do anything else, I will ask my own countrymen to assist me.

Q. Are you married? A. Yes, sir.

Q. How old are you? A. Twenty-five.

Q. Where is your wife? A. In Italy with my two children.

Q. Do you think it is fair to your wife and children, and to your countrymen, to allow yourself to reach the stage where you will become a permanent care on them by reason of your blindness? A. I don't care, but I haven't that thought in mind; I am afraid to have it done, and I am not going to have my eye pulled out.

The injured man was urged by Mr. Blackwell, his attorney, to have the operation performed. The following is an extract from the testimony: —

Q. (by Mr. BLACKWELL). Joe, if I say it will be much nicer for you if you have it out, and that the doctor will put in a glass eye which will look very much like the other, and if I tell you that there will be no pay whatever connected with having it taken out, — and you know it will be no easier for you to live in Italy if you are blind than here, — will you not consent to have this thing done? A. I am not satisfied; I don't care, I am afraid to have it done.

The injured man, Nicotero, was requested and promised to report at the office of the Industrial Accident Board on the

day following the hearing, to give the chairman of the arbitration committee an opportunity to get Nicotero to talk to an Italian clergyman of his faith, or some prominent Italian in whom he might have confidence, who would try to convince him that the best thing for him to do would be to submit to the simple operation to save the other eye, and restore him to full health and industry. Nicotero did not keep his promise to come. After an interval of about a fortnight the chairman of the arbitration committee got in touch with Mr. Bianco, a representative of the Italian consul's office, and asked his assistance in getting Nicotero to accept this necessary operation. On Feb. 6, 1914, Nicotero called at the office of the Industrial Accident Board, accompanied by Mr. Bianco, representing the Italian consul, and Guiseppe Cavallo of 13 Cherry Street, Newton. The injured man, Nicotero, told Mr. McSweeney that he had decided to accept the offer of the insurer to have an operation on the eye, and through Mr. Bianco submitted the names of two eye specialists to perform this operation. This offer was referred immediately to the representative of the insurance company, who agreed to employ Dr. Francis J. Proctor of 397 Marlborough Street, one of the physicians named by Nicotero, and to defray all the expenses of this operation, and of the subsequent medical care of Nicotero.

On February 10 a letter was received from Francis H. Blackwell, attorney for Nicotero, which said that Nicotero had come to his house and informed him that he had been interviewed by the Italian consul and promised to have the operation performed, but had changed his mind, and requested Mr. Blackwell to notify the consul and the Industrial Accident Board to this effect, and further, that he would not have an operation except in Italy, where his family is. Mr. Blackwell in his letter inclosed a copy of a letter to the Italian consul in which he said, "I hope it may result in your being able to induce Guiseppe to have this operation immediately, because more than one of the eye doctors have stated that impairment of the remaining eye is imminent, and affectation certain at or approximate to this time." Subsequently, the chairman of the arbitration committee consulted with Mr. Blackwell and Mr. Bianco, representative of the Italian consul; and in view of the

fact that Nicotero remains obdurate in his decision that he will not have the operation performed, although fully realizing the necessity for it, and the fact that without it he will probably become blind, further attempts to impress Nicotero to save himself from blindness seem to be unwarranted.

The arbitrators find that due to an injury arising out of and in the course of the employment, Nicotero's left eye has been totally lost. The injured employee has been examined by a number of reputable eye specialists, all of whom agree that there is no possibility of recovering the sight in the injured eye. All these specialists also agree that if the injured eye is not removed the right eye, which is now normal, will almost inevitably become sympathetically infected, which will end in loss of vision in that eye and total blindness. The insurer offers to pay for the operation of removing the injured eye, which operation is not dangerous to life, and from which there are to be apprehended practically no serious consequences. The specialists further agree that if this operation is performed the good eye will be saved.

The arbitrators further find that the injured workman agreed on February 6 to accept the offer of the insurer to employ Dr. Proctor to perform the necessary operation, and subsequently refused to have this operation performed, saying that he would not consent to an operation being performed other than at his home in Italy.

The arbitrators find a long line of English decisions which consistently adhere to the principle laid down in *Warncken v. R. Moreland & Son, Ltd.*, 2 B. W. C. C. 350, which says:—

A workman must behave reasonably, and if the incapacity, or the continuance of the incapacity, after a certain time, is due to the fact that he has not behaved reasonably, then the continuing incapacity is not a consequence of the accident, but a consequence of his own unreasonableness. —

In *Donelly v. W. Baird & Co., Ltd.*, 1 B. W. C. C. 95, the principle is expressed more in detail as follows:—

Where the operation is not attended with risk to health or unusual suffering, and where the recovery of the use of the [limb] is reasonably clear, if . . . the sufferer, either from defect of moral courage, or because he

is content . . . to live on the pittance . . . under the . . . act, refuses to be operated on, . . . his continued inability to work . . . [is] the result of his refusal. (Paddington Borough Council *v.* Stack, 2 B. W. C. C. 402; Anderson *v.* William Baird & Co., 40 Sc. L. R. 263; Sweeney *v.* Pumpherston Oil Co. Lim., 40 Sc. L. R. 721.)

The arbitrators find in this case that this operation is not attended by risk to health or unusual suffering. It is reasonably certain that the effect desired to save the good eye will be accomplished. In consequence of a defect of moral courage, and an unreasonable attitude of fear on the part of the injured employee, he chooses, therefore, to put himself in the danger of being permanently blind and a public charge, whereas the submission to a simple and not dangerous operation will restore him to health and industry. Nicotero is an unskilled and uneducated man, dependent wholly upon manual labor for his livelihood. There is no substantial reason for claiming that he will be disfigured, because already the injured eye is atrophied and he is disfigured. If this operation had been performed at the time it was first offered he would at the time of writing this decision probably be in as good a position to labor and to earn as high wages as he was before the injury.

Under the circumstances, therefore, the arbitrators find that the obligation on the part of the insurer to continue the payment of disability compensation should cease. The employee has been paid fifty weeks' additional compensation for the total loss of one eye, as provided in section 11 of Part II., and his weekly compensation of one-half his average weekly wage should cease on March 1, 1914, for the reason that all disability and incapacity after that date will not arise out of the injury received in the course of the employment, but will be due wholly to the employee's unreasonable refusal to undergo an operation for the removal of the left eye, the expense of which has been proffered in good faith by the insurer.

EDW. F. MCSWEENEY.
RALPH W. STEARNS.

Edward A. McEttrick dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, New Albion Building, Thursday, March 26, 1914, at 2 P.M., and affirms and adopts the findings of the committee of arbitration.

Howard Sheffield, Esq., attorney for the insurer, renewed at the hearing on review the offer previously made to the committee of arbitration, and stated that his company would pay for an operation in Massachusetts for the removal of the affected eye by a reputable specialist selected by the employee, or his attorney, and pay compensation on account of the incapacity for work resulting from said operation.

F. H. Blackwell, Esq., at the request of the chairman of the Industrial Accident Board, asked the employee to consent to the operation, and the latter stated that he desired to have it performed in Italy and would not consent to its performance in Massachusetts.

By agreement, the offer of the insurer was held open for ten days, the attorney for the employee stating that he would endeavor in the meantime to secure the latter's consent to the operation. Later, the Board was informed that the employee would not agree to have the operation performed in this State.

All of the medical evidence in the case shows that there is not any possibility of recovering sight in the affected eye, and that if said eye is not removed, the right eye, which is not at present affected, will probably become sympathetically infected and total blindness result. The removal of the injured eye will preserve the sight in the remaining eye to the employee. The evidence shows that the operation would be a simple one and would not be attended with danger to life or health, or with any suffering, and that the removal of the eye would restore the employee to his full earning capacity as a laborer.

With an operation the evidence shows that the employee will no longer be incapacitated for work; without an operation incapacity for work will continue indefinitely. There is, of course, no question of compelling the employee to submit to an operation. The question at issue is whether an employee who unreasonably declines to undergo an operation that is shown to be safe, and free from pain or danger, is to be con-

sidered as incapacitated as a result of an injury, or whether such incapacity should be attributed to his voluntary action in refusing to accept reasonable and expert surgical treatment.

It has been shown by evidence that the operation will afford a cure of the condition which causes the employee's incapacity for work, and will prevent any loss of vision in the unaffected eye, and it has been shown, further, that there is no danger by reason of the performance of this operation. Since the operation will not be attended with danger to life or health, and according to expert medical and surgical opinion offers a cure of the conditions which cause incapacity for work, the employee should either voluntarily accept the operation which the insurer agrees to provide or withdraw his claim for compensation. The employee should at all times avail himself of such reasonable remedial measures as are within his power to obtain, and endeavor to advance his restoration to normal working efficiency in every possible reasonable way.

The Industrial Accident Board finds, upon all the evidence, that the refusal of the said employee, Guiseppe Nicotero, to permit of the performance of an operation for the removal of the affected eye is unreasonable, and that by reason of said unreasonable refusal he is incapacitated for work, said incapacity not being due to the injury; therefore no compensation is due said employee after March 1, 1914, at which date all incapacity due to the injury ceased.

JAMES B. CARROLL.

DUDLEY M. HOLMAN.

DAVID T. DICKINSON.

EDW. F. MCSWEENEY.

JOSEPH A. PARKS.

CASE No. 630.

ELLEN TWOOMEY, WIDOW OF JOHN T. TWOOMEY, *Employee*.

PATRICK J. BURNS, *Employer*.

ROYAL INDEMNITY COMPANY, *Insurer*.

NO CAUSAL RELATION BETWEEN THE PERSONAL INJURY AND
DEATH, WHICH WAS DUE TO A PERFORATED ULCER OF
THE STOMACH.

The employee received a personal injury arising out of and in the course of his employment, by reason of a kick on the right hand by a horse while he was attempting to fit a shoe on said horse. He was incapacitated for work for a period of about a month, after which he resumed his regular employment. Shortly afterwards he became ill, and died in the hospital a day later from a perforated ulcer of the stomach. The medical evidence showed that there was no causal relation between the ulcer and the injury.

Held, that the death of the employee did not result from a personal injury arising out of and in the course of his employment.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Ellen Twoomey, widow of John T. Twoomey, *v.* Royal Indemnity Company, this being case No. 630 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Dudley M. Holman, representing the Industrial Accident Board, chairman, Patrick D. Walsh, Esq., 6 Beacon Street, Boston, Mass., representing the widow, and George H. McDermott, Esq., Tremont Building, Boston, Mass., representing the insurer, heard the parties and their witnesses in the Hearing Room of the Industrial Accident Board, New Albion Building, Boston, Mass., on Friday, April 24, 1914, at 10 A.M.

F. M. Cummings, Esq., appeared for the widow and Arthur H. Stetson, Esq., for the insurer.

Mr. Cummings stated that he thought the question was entirely a medical dispute, a question of whether the injuries received in the accident caused the death.

Mr. STETSON. The question as I understand it — I understood that the claim was made that the injury which this man sustained on September 20. while in the employ of our insured, was the cause of his death.

We dispute that, and we admit nothing as to the nature of the injury or of the cause of the death. We dispute the causal connection between the accident and death. To save time, we will admit that John T. Twoomey was kicked in the right hand by a horse which he was shoeing in the blacksmith shop of P. J. Burns, who is our insured, on the twentieth day of September, 1913; and I can go further; we will admit, if I am correct in the dates, that he worked during the day of Sept. 20, 1913, which was the day he was injured, until 5 o'clock in the afternoon, and that he was away from work until the twentieth day of October, 1913; that he worked from the twentieth day of October up to the twenty-fifth day of October, and that about 10 o'clock in the morning of the twenty-fifth day of October he was taken with the sickness which proved to be his last sickness; that he was taken to the Boston City Hospital on the morning of the 26th, somewhere early in the morning, and that he died at the City Hospital a few hours after being admitted there. It can be agreed that compensation was paid to Mr. Twoomey amounting to \$22.88, — that would be at the rate of \$10 a week, — and that medical bills were paid to the amount of \$17, — a total of \$39.88; that a request was made upon Mrs. Twoomey, the dependent widow, who is the claimant in this case, by the insurance company some time during November, for permission to have an autopsy performed on the body of John Twoomey; that the insurance company was to pay all the bills connected with the autopsy; that she was to be represented by her own physician; that this request was refused; and that a copy of the request and refusal was sent to the attorney for Mrs. Twoomey, Mrs. Twoomey and the Industrial Accident Board.

John Francis O'Brien, clerk in the superintendent's office at the Boston City Hospital, was duly sworn and read the report of the hospital in the case of John Twoomey, which is as follows: —

SURGICAL RECORDS, VOL. B. 640, PAGE 98.

Casualty 2. Oct. 26, 1913. Dr. Monks. Liu.

John Twoomey, 53 years, married. Ireland. Horseshoer, 24 St. Rose St., J. P.

Intestinal perforation.

Family history and past history: Not obtained.

Present illness: Patient in perfect health until yesterday morning, when, while working, he was suddenly taken ill with an acute abdominal pain. Vomited repeatedly, but vomitus was never fecal. No blood in vomitus.

Physical examination: Not made. See local.

Local. Clarke: Patient in profound shock, conscious and rational. Temperature 98, pulse 110, W. B. C. 13,000. Abdomen board-like with dullness in right flank. Dullness does not shift on moving. Heart and lungs negative. Urine apparently normal (macroscopic). Diagnosis

of perforation made and service notified. Patient grew rapidly worse given stimulation, but was unconscious before visiting surgeon arrived. Patient admitted at 4.45 and died at 6.03 A.M.

Discharged dead. No autopsy.

Dr. Fred W. Beering testified as follows: —

I attended John Twoomey of St. Rose Street some time in the month of September, 1913; he called on me in the afternoon about 5.30 or 6 o'clock on the day he was injured, which was probably September 20, and I found that he had a slight compound fracture of the finger, which I reduced to a simple fracture; it went septic on the third or fourth day, and then the glands of the arm were swollen; I saw him from ten to fifteen times; I knew that he died at the City Hospital; I sent him there; I saw him about 3 o'clock, I think it was, Saturday afternoon — about 3 or 4 o'clock in the afternoon. He went to the hospital Sunday morning. I think that was the 25th of October, but I am not positively sure; he had a streptococcus infection, and I presume that the streptococcus might have been the cause of the peritonitis, being in the condition he was in.

Q. In your opinion, would you say that the injury which he received on Sept. 20, 1913, was the cause of his death on Oct. 26, 1913? A. Well, if it wasn't for the septic infection I would say no, it was not the cause; the streptococcus being there, in my opinion, it would have a strong tendency to cause it.

Q. Other than that septic condition, was there any other disease or injury from which he was suffering? A. No; not that I knew of at the time.

The diagnosis of the City Hospital record agrees with my diagnosis thoroughly. I attended Mr. Twoomey previous to September, when he had this accident. I was his family physician. I have known him probably ten or twelve years previous to the accident. I had treated him during that time for acute indigestion. The last time I saw Twoomey professionally, to the best of my belief, was between two and a half and three years ago. At that time I treated him for acute indigestion. I have forgotten which finger was fractured, and I have also forgotten which hand it was. A compound fracture is where any portion of the bone will stick through and break through the skin. In order to have a compound fracture there must be some breaking of the skin. Four or five days after he came to me it went septic. Septic peritonitis could come from a septic compound fracture in this respect, the bacteria that has caused the septic condition can cause septic peritonitis. This swelling in his arm took place about two or three weeks afterwards, at least two weeks afterwards. The nature of the swelling was just a little red line in the large glands in the elbow and under the arm. A septic peritonitis can develop in twenty-four to forty-eight hours. In my opinion it would

be a little longer than twelve hours, although it's possible in twelve hours. As a rule, those things go along forty-eight hours, I think, before they — that is, you don't look for much trouble until forty-eight hours have passed.

Q. (by arbitrator for insurance company). What other cause might there be — could you think of any other cause for intestinal perforation?

A. You mean a cause that would cause perforation? Ulcers would be one cause, the bowels becoming tied up would be another cause of it.

Q. You could get a perforating ulcer of the intestines without any septic condition? A. Surely.

Q. Whether you could get infection for your ulcerous formation in the intestines, — whether you could get it without the entrance of outside bacteria? A. Certainly.

Q. (by arbitrator for widow). I understood you to say that the glands under the elbow and arm became swollen two or three weeks after, — what would that indicate? A. It indicated that the bacteria had gone up the arm.

Q. And that bacteria was caused from the wound in the finger? A. That's my opinion, yes, sir.

Acute indigestion could not cause the swelling of that arm.

Mrs. Ellen Twoomey testified as follows: —

My husband never complained of pain in the stomach or anything to indicate that he had ulcers of the stomach. I was married twenty-five years to Mr. Twoomey before his death. I recall the accident and his coming home on that day, but I did not look at his hand. He was in such a sick condition that I tried to make him comfortable. I didn't look at his hand. I did not see any cut, but I think there was a discolorment in his hand. Dr. Beering took care of his hand and bandaged it and I did not have much to do with it. I saw his hand in the meantime, and I didn't notice any scar on it. My husband was troubled with attacks of indigestion for fifteen or twenty years; he did not have them very frequently; the last time he had an attack was three years ago; he used to take soda for the indigestion; during the last year previous to his death I remember him taking a little soda to the shop. I never noticed any swelling of the hand where he was kicked. When I speak of a cut on his hand I mean that I did not see any blood or any large cut; if there was a small incision which was not bleeding at the time I saw his hand I would not notice it; there was no bleeding that I noticed.

Patrick J. Burns testified as follows: —

I am in the employ of P. J. Burns, the man with whom Mr. Twoomey worked before his death. I knew Mr. Twoomey for about a year and seven months; he worked with me in the shop. I can't tell just the date

when Mr. Twoomey was fitting a shoe on the foot of this horse. He went over and put his hand down to pick up the horse's foot, and the horse picked up a little quick and just hit him on the knuckle. I think he was hit on the joint of the little finger of the right hand. There was no shoe on the horse; he was just going to fit a shoe on. It was pretty near 5 o'clock when it happened, and he probably worked fifteen or twenty minutes after. I saw the accident happen, and I looked at the hand after it happened; there was no cut as I could see. I have known Mr. Twoomey about a year and six or seven months. During the time I have known Mr. Twoomey I have known him to be troubled with indigestion on two or three occasions; he would have pains in his stomach; he would have to sit down and rest sometimes for a couple of hours and sometimes an hour. I only saw him vomit on two occasions. I was there when he had that attack on the 25th of October. It just came the same as all the rest; he got pains in his stomach and he sat down for a little while; he commenced to get worse and finally we had to send for a doctor; we sent for Dr. Kenneally; after the doctor gave him some lime water and something else he vomited. I couldn't say how long ago he had an attack previous to this one. I should judge he had about three or four during the year previous to that. Mr. Twoomey told me he was always more or less troubled by that indigestion; he said there were lots of things he would like to eat, but he could not touch them because they did not agree with him.

Mr. P. J. Burns testified as follows: —

I am the proprietor of the shop where Mr. Twoomey worked shortly before his death. I only know what I was told about the accident. The accident must have occurred in the forenoon. If it happened on September 20 it must have happened in the forenoon. Occasionally I go in from one shop to the other, and Mr. Twoomey and my nephew or some one of them told me that Mr. Twoomey got hurt. [Mr. Burns identified his handwriting on the report of the accident.] I saw Mr. Twoomey the day he was hurt; after he got hurt a little while he told me he did not think he could keep on working — his hand was painful. I looked at his hand and I didn't see any cut or anything of that sort. I did not notice anything that would indicate that he received a blow. I advised him to use cold water. He worked just a little while. It must have been in the forenoon, because we don't open the shop in the afternoon. Mr. Twoomey had worked for me about a year and seven months. I recall the attack of indigestion he had when he came back on October 25; I was present at that time. I have known of his being troubled that way at other times while in my employ. Two or three times I saw him have attacks similar to the one he had in October. I have heard him speak about being troubled with indigestion; he would say that this soda always relieved him very well on such attacks; he always seemed to have some at work;

he used to keep some in a bottle at the shop. [Mr. Stetson produced a bottle and Mr. Burns stated that he thought it was the same bottle; "it looks very much like it."] He had perhaps three attacks like that while in my employ. I sent in a report of the accident to his hand. I did not send in a report of his death to the Industrial Accident Board. I saw this man sick on two or three occasions. I could not tell whether he was suffering from indigestion or some other trouble.

Q. Could you tell the sickness that he had the day he was taken to the hospital, — was it the same sickness? A. It was the same, I should say; the symptoms were the same; he told me the same.

I called a doctor for him. We tried his favorite remedy before we called a doctor, but that perhaps was not quite strong enough, and we got some new fresh bread soda, and he took some of that also; the symptoms were very much alike, that is, he acted the same with regard to pains in his stomach. I only knew what he told me. I am not able to tell whether they are the same or not.

David D. Scannell, M.D., testified as follows: —

Q. Should you say, Doctor, that there could be any causal connection between the accident which happened to this man on September 20, when he was kicked in the hand by a horse, and the death under the conditions which you have before you? A. Taking the facts as submitted to me, absolutely no.

Q. Could a septic peritonitis result from a septic compound fracture? A. I should say no. Conceiving a man to be so extensively poisoned from a very extensive septic compound fracture, I suppose it might be a remote possibility — that such a thing might occur; it's presumably out of the question. I never saw one.

For a case such as this, the proper treatment would be, the diagnosis being made, immediate operation, right away. I should say it would not be possible for a septic condition, say your finger or your hand, to cause blood poisoning to set in and to cause death in the manner that Mr. Twoomey died. Any man with a gastric ulcer has a lower vitality. My testimony is based absolutely on what has been suggested to me at this hearing; the glands in the arm would indicate nothing more or less than localized infection that was giving him infection all up his arm.

Q. Would an injury, assuming that a man had a septic finger, and that spread so that it affected his arm, and he had been laid up three or four weeks as the result of a compound fracture, accompanied by sepsis, — would there be any connection between that condition and this perforation? A. I believe absolutely not. I don't believe that a man could develop a gastric ulcer in any kind of infection of this character.

On the evidence, he was seen while in the hospital by Dr. Clarke. We learn from the records that he was seen by one of the visiting men. That report would indicate that Clarke, the house surgeon, immediately sent

for a visiting man, who passed on him and found the case was not to be touched. Indigestion is merely a symptom of gastric ulcer. These attacks of indigestion might be a symptom of the ulcer and be recovered from the attack, but the ulcer still remained; that could have been cleared up by an autopsy; without the autopsy, I have to take conjecture; an autopsy at this late date would be pretty dubious, I think. In my opinion it would be impossible for a compound fracture of the middle finger to develop a septic peritonitis and cause obstruction of the bowels and death in this way.

L. R. G. Crandon, M.D., testified as follows: —

From my knowledge of the case as I have heard the facts here at this hearing, I should say that Mr. Twoomey died from a perforating ulcer of the stomach. From the history of the case, I should say there was no causal relation between the accident and death of this man whatever.

Q. Would you say there was no evidence to show that this man suffered from a septic condition sufficient to give him peritonitis? A. Absolutely not.

A septic peritonitis could come from a septic compound fracture only in the remote possibility of the last day or two; it might be possible that a septic peritonitis could develop; I have never seen one; a septic peritonitis could not develop as suddenly as this one did, in a matter of eight hours.

Q. What would frequent abdominal pains accompanied by vomiting indicate as to Twoomey's condition? A. Something wrong with his digestive apparatus.

Q. If this man had a septic peritonitis, what would you expect to see in his temperature? A. Expect the last four hours of life he would have high temperature; sometimes as death approaches it goes down to normal.

I did not see Mr. Twoomey at all; all my testimony is based on the record of the hospital and testimony given here.

Q. If the man went to work with a weakened hand after receiving such an injury as Mr. Twoomey received, — if the man went to work four weeks later with his hand in a weak condition, — what might that indicate? What was the trouble with his hand if his hand was quite weak four weeks later, after the time he received an injury? What would that indicate? A. Nothing more specific than that it had been injured.

Q. And if that occurred when it was accompanied with swelling of the arm, that might show a septic condition, might it not? A. Oh, yes.

Q. If a man was suffering with gastric ulcer, and that resulted in death, death caused by the gastric ulcer, would he be likely to be able to work just previous to that, — his death? A. Yes.

Q. (by Mr. HOLMAN). Could there be any possible connection, you having heard the testimony and having seen the hospital records, between

the injury of September 20, when he was kicked on the hand by a horse, and his death in the City Hospital, on October 26? A. No connection whatever.

Q. In the case of a man who has had gastric ulcers and received an injury as this man did, and the blood poisoning setting in as was indicated here, would or would not that aggravate that gastric ulcer to such an extent that it would develop fatally? A. I see no reason why it should.

There would be no remote connection between the accident to the finger and blood poisoning and the perforating ulcer, even by acceleration or anything else.

Q. Whether if there was a septic condition in one part of the body, as for instance, in the hand or arm, and later evidence of sepsis had developed, — whether it would be possible to have a septic condition in the stomach or any of the intestines, two or three weeks later, which would bring about a septic condition causing peritonitis? A. Absolutely not; to have peritonitis appear one would have to go on a continuous process getting worse and worse from the first to the last.

We find, therefore, on the weight of the medical evidence, and all the circumstances in connection with this case, that the death did not result from the injury sustained on September 20, and that the widow is not entitled to recover compensation.

DUDLEY M. HOLMAN.

GEORGE H. McDERMOTT.

PATRICK D. WALSH.

CASE No. 639.

DOMINICK MUSTAİKAS, *Employee.*

GRIFFIN WHEEL COMPANY, *Employer.*

CASUALTY COMPANY OF AMERICA, *Insurer.*

SPATTER BURN AGGRAVATES A PREVIOUS VARICOSE CONDITION AND CAUSES INCAPACITY FOR WORK. EMPLOYEE ENTITLED TO COMPENSATION.

The employee, a foundry helper, received a slight burn by reason of the spattering of hot iron, and later received a second burn in the same place. He also was suffering from a varicose condition which was aggravated by the spatter burns, necessitating an operation.

Held, that the employee was entitled to compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Dominick Mustaikas v. Griffin Wheel Company, this being case No. 639 on the files of the Industrial Accident Board, reports as follows: —

The arbitration committee, consisting of Edward F. McSweeney of the Industrial Accident Board, chairman, Meyer Bloomfield, representing the employee, and Joseph W. Russell, representing the insurer, heard the parties and their witnesses in the Aldermanic Chamber, City Hall, Chelsea, Mass., Tuesday, Jan. 20, 1914, at 10.30 A.M.

Dominick Mustaikas, the injured employee, was employed as a helper in the foundry of the Griffin Wheel Company as a time-worker, at an average weekly wage of \$24. Said company is insured with the Casualty Company of America.

One day in September, 1913, Mustaikas sustained injuries to his right leg as a result of hot iron spattering on his leg. He worked for four days afterwards, and on the 21st consulted Dr. John Milton Wells, and made three visits thereafter. On the 28th of September he received another burn, while making a mold of hot sand; while pouring water in, it splashed on his right leg in the same place as the first injury. He worked until the 2d of October, consulting no doctor, at which time he was obliged to give up work, and has not worked since. By agreement, the date of the injury was fixed as Sept. 17, 1913.

Dr. John Milton Wells of Chelsea, Mass., testified that he had given special attention to varicose conditions of the veins, and on September 24 there were old scars on both legs. In the opinion of Dr. Wells an operation was the inevitable consequence of the pre-existing condition, and would eventually be necessary irrespective of any accident. He found red scars indicating injuries of not later than about two years prior to this time; this condition was evident on both legs. The only thing the man could do to support these veins while working was to wear an elastic support. He put three yards of such a dressing on Mustaikas' legs, and told him to go to work. He

came three times after that, but from then until November 6, Dr. Wells lost track of him. He said that the condition of Mustaikas' legs when he first saw him was consistent with his having received a burn the week previous, such as was described, and that this could have been responsible for setting up the condition which was shown; but in his opinion the accident precipitated trouble which would have happened anyway. Contact with his clothing, or a slight scratch from the same, might have brought about the same results. Dr. Wells saw the man again on November 6, and was told he had been to the Massachusetts Homœopathic Hospital, which admitted him on the 9th of October, and discharged him on the 23d, after operating on him. At that time the scars on both legs were not healed, but were in a granulated condition. He thought two weeks after November 6 Mustaikas could have gone to work. The operation, in Dr. Wells' opinion, was not successful.

Dr. David J. Smorgonsky testified that when Mustaikas first visited him, about October 2, he found a bleeding wound which he dressed; the second day the injured employee called he dressed it again. The wound was deep around the veins, and at one time Mustaikas had a hemorrhage which he had great difficulty in stopping. He told the injured employee that the wound would have to be operated on because it was so deep. He tried to get him into the Massachusetts General Hospital, but there was no place there for him. Finally he found a place for him in the Massachusetts Homœopathic Hospital, where he was operated on. He corroborated Dr. Wells' testimony that the injured man had varicose veins on both legs, and that he advised him, when he went to the hospital, to have both legs operated on at the same time. In his opinion he could have returned to work three weeks after October 21, and should have been probably able to return to work by November 15.

After consideration of all the testimony, the arbitrators find that Mustaikas was injured by burns which arose out of and in the course of his employment. These burns produced ulcers which of themselves were of little consequence, but because superimposed on the existing varicose veins of the right leg,

affected these veins and made an operation necessary. The fact that the right leg required operation gave opportunity to operate for the varicosity in the left leg, but there is no evidence that the period of incapacity was lengthened by the operation of the left leg.

At the request of the insurer the following is inserted: —

The report of this accident was made by his employer Dec. 15, 1913, and then at the request of the Casualty Company of America. The claim for compensation made by the injured employee is dated Jan. 5, 1914, which is subsequent to the request for arbitration, which is dated Dec. 27, 1913.

The question before the arbitrators in this case is whether an injury superimposed on an existing diseased condition can be regarded as a personal injury which entitles the injured employee to compensation under the act.

In *Clover, Clayton & Co. v. Hughes*, Butterworth's 275: "A workman suffering from an advanced aneurism of the aorta was doing his work in the ordinary way by tightening a nut with a spanner. This ordinary strain caused a rupture of the aneurism which resulted in death." The county court judge, on conflicting evidence, found that the workman's death resulted from personal injury by accident, within the meaning of the act. Held (Lord Atkinson and Lord Shaw dissenting), that there was evidence on which the county court judge was justified in so deciding.

In *Lloyd v. Sugg & Co. Ltd.*, Vol. I.-IV., Minton-Senhouse, p. 5, Vol. 2, Court of Appeals: "An injury may be caused by an accident, although no injury would have been thereby suffered but for the existence of a disease which was aggravated by the accident."

The arbitrators find that in this case the injured employee was suffering from an aggravated condition of varicosity in both legs. As a result of burns arising out of and in the course of his employment, these superimposed burns on the existing varicose veins resulted in ulcers which finally incapacitated him for labor. He was sent to the hospital, where an operation was performed on the injured leg, and advantage taken of this opportunity to operate at the same time on the other leg. As a result of this operation (there being no evidence that the

operation on the left leg lengthened the period of disability) he was incapacitated for labor from Oct. 2, 1913 (the fifteenth day after the injury), to Nov. 20, 1913, and is therefore entitled to the maximum weekly compensation of \$10 a week during that period, or \$70; and to reasonable hospital and medical charges during the first two weeks after the injury.

EDW. F. MCSWEENEY.
MEYER BLOOMFIELD.

Joseph W. Russell dissents.

CASE No. 650.

AARON LEDERMAN, *Employee*.
DIAMOND SHOE COMPANY, *Employer*.
STANDARD ACCIDENT INSURANCE COMPANY, *Insurer*.

INCAPACITY DUE TO DEMENTIA PRÆCOX HAVING NO CAUSAL RELATION WITH THE INJURY.

The evidence before the committee of arbitration showed that the employee received a personal injury which produced a mental condition that accelerated a neurasthenia, which had existed for years, to such a degree that it absorbed the employee's entire thoughts. As a result of the acceleration of this neurasthenic condition, dementia præcox developed and incapacitated the employee.

Held, that the employee was entitled to compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board, hearing the impartial and other experts, finds and decides that the condition of dementia præcox had no connection with the injury.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Aaron Lederman v. Standard Accident Insurance Company, this being case No. 650 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Dudley M. Holman of the Industrial Accident Board, chairman, Henry M. Schaub, Esq., representing the employee, and Everett E. Arey, representing the insurer, heard the parties and their witnesses

in the Aldermanic Chamber, Brockton, Mass., on Wednesday, Feb. 25, 1914, at 10.30 A.M., and on Tuesday, March 3, 1914, at 10.30 A.M.

It appeared in evidence that Aaron Lederman was an employee of the Diamond Shoe Company of Brockton; that on July 7, 1913, when he came to work in the morning, he stepped on a bench in the shop to hang up his coat, and while standing on the bench it gave way under him and he fell to the floor, and in falling the left side of his stomach was injured and a piece of wood which broke from the bench also hit him. It made him faint, and he went to a doctor that night, who stated, "By my examination I found skin excoriation on the stomach region and severe pain by pressure on the left side, outside of his navel." He afterwards went to Dr. Chase of Barristers Hall. He also was attended by Dr. C. J. Dacey of Brockton and by several other doctors.

He was sent by Dr. Dacey to the Massachusetts General Hospital. Dr. Dacey examined him first on October 6, when Lederman complained of pain in his left side, stomach and headaches. On examination of the side, he could find no objective signs of injury, and he treated him for intestinal indigestion. Lederman came so often to see him in 1913, in the fall, that he did not trouble to keep a record of the visits. He complained of constant pain in the left side. At the Massachusetts General Hospital they gave him a prescription for indigestion. Dr. Dacey stated that Lederman was also suffering from neurasthenia, but the neurasthenia was not caused by the accident, although it could be aggravated by the accident. Dr. Dacey stated that when he first came to him his mental condition was pretty well, but he grew worse. The accident was not the cause of the mental condition. The neurasthenia was a condition which had existed for years, and an accident occurring on which he dwelt and thought would accelerate the mental condition. In this case it accelerated it to such a degree that after a time that was the only thing he thought of. Lederman's mental condition rapidly grew worse, and Dr. Dacey advised having him taken to the hospital in Boston for observation. He went to the Psychopathic Hospital, where they had him under observation for a week. The record of the Taunton Hospital was also read, as follows:—

This is to certify that A. Lederman was committed to the Taunton State Hospital, Taunton, Mass., Dec. 3, 1913, suffering from a mental disease known as dementia præcox, and that he was discharged on trial, against advice, on Jan. 18, 1914.

A letter was sent to Elmer E. Southard, M.D., director of the Boston State Hospital, Psychopathic Department, by the chairman of the arbitration committee, as follows: —

Have you any record of an examination made at your hospital of Aaron Lederman of Brockton, who was afterwards committed to the Taunton State Hospital on December 3, suffering from dementia præcox?

In an arbitration hearing in which this man is asking for compensation it was intimated that he was examined at your hospital, and from there was sent to the Taunton State Hospital. This man received an injury on July 7, 1913, by the breaking down of a table on which he was standing which precipitated him to the floor, and he was hit by a piece of the table. He was examined by a physician that same night, who certifies that "he was complaining of pain in the left inguinal region and in the left side of his chest. By my examination I found skin excoriation on the stomach region and severe pain by pressure on the left side, outside of his navel." I do not think any X-ray was taken of the injury. Dr. Dacey of Brockton, who treated the man some months after the accident, advised that he be taken to you for observation, and I understand that he was under observation for a week. Dr. Dacey stated that when he first came to him his mental condition was pretty good, but he grew rapidly worse. The accident was not the cause of the mental condition. The neurasthenia was a condition which had existed for years, and an accident occurring on which he dwelt and thought would accelerate the mental condition. In this case it accelerated it to such a degree that after a time that was the only thing he thought of. Dr. Dacey stated that dementia præcox could not have resulted from the injury.

On this statement of fact, would you say that the accident was the cause of his present mental condition? Would the accident, if there were dementia præcox in an undeveloped or an unnoticed form, so accelerate that mental disease that it would manifest itself, to any appreciable degree, earlier than it would otherwise have manifested itself?

I would be very greatly obliged to you if you can give me the information I seek.

Dr. Southard replied to the above letter, as follows: —

In answer to yours of March 5, 1914, I would say that a patient, Abe Lederman, of 38 Otis Street, Brockton, was committed to the Taunton State Hospital Nov. 29, 1913, in the man whom you refer to as Aaron Lederman of Brockton.

I find that the patient was examined at the Out-patient Hospital (Boston), Psychopathic Hospital Nov. 29, 1913, and that I

in the Aldermanic Chamber, Brockton, Mass., on Wednesday, Feb. 25, 1914, at 10.30 A.M., and on Tuesday, March 3, 1914, at 10.30 A.M.

It appeared in evidence that Aaron Lederman was an employee of the Diamond Shoe Company of Brockton; that on July 7, 1913, when he came to work in the morning, he stepped on a bench in the shop to hang up his coat, and while standing on the bench it gave way under him and he fell to the floor, and in falling the left side of his stomach was injured and a piece of wood which broke from the bench also hit him. It made him faint, and he went to a doctor that night, who stated, "By my examination I found skin excoriation on the stomach region and severe pain by pressure on the left side, outside of his navel." He afterwards went to Dr. Chase of Barristers Hall. He also was attended by Dr. C. J. Dacey of Brockton and by several other doctors.

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This is to certify that A. Lederman was committed to the Taunton State Hospital, Taunton, Mass., Dec. 3, 1913, suffering from a mental disease known as dementia præcox, and that he was discharged on trial, against advice, on Jan. 18, 1914.

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In an arbitration hearing in which this man is asking for compensation it was intimated that he was examined at your hospital, and from there was sent to the Taunton State Hospital. This man received an injury on July 7, 1913, by the breaking down of a table on which he was standing which precipitated him to the floor, and he was hit by a piece of the table. He was examined by a physician that same night, who certifies that "he was complaining of pain in the left inguinal region and in the left side of his chest. By my examination I found skin excoriation on the stomach region and severe pain by pressure on the left side, outside of his navel." I do not think any X-ray was taken of the injury. Dr. Dacey of Brockton, who treated the man some months after the accident, advised that he be taken to you for observation, and I understand that he was under observation for a week. Dr. Dacey stated that when he first came to him his mental condition was pretty good, but he grew rapidly worse. The accident was not the cause of the mental condition. The neurasthenia was a condition which had existed for years, and an accident occurring on which he dwelt and thought would accelerate the mental condition. In this case it accelerated it to such a degree that after a time that was the only thing he thought of. Dr. Dacey stated that dementia præcox could not have resulted from the injury.

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I would be very greatly obliged to you if you can give me the information I seek.

Dr. Southard replied to the above letter, as follows: —

In answer to yours of March 5, 1914, I would say that we examined a patient, Abe Lederman, of 38 Otis Street, Brockton, evidently the same man whom you refer to as Aaron Lederman of Brockton.

I find that the patient was examined at the Out-patient Department of the Psychopathic Hospital Nov. 29, 1913, and that Dr. Dacey was notified

on that date that the examining physician, Dr. A. W. Stearns, thought Lederman to be suffering from dementia præcox, and that, as patient was not eligible for treatment in the Psychopathic Hospital on account of his settlement in Brockton, it was recommended that he be sent to Taunton.

I note that you say that Lederman was committed to the Taunton State Hospital on Dec. 3, 1913, and I have no doubt that the Taunton physicians will by this time have been able to make up their minds as to the nature of the mental disease with which Mr. Lederman is suffering. If they disagree with our off-hand diagnosis, based upon work of an hour, more or less, I shall not be disturbed.

Meantime, your question as to the statement of fact, and particularly bearing in mind that the patient's neurasthenia had existed for years: I should state without hesitation that the accident could not be the cause of dementia præcox. Dementia præcox is not a disease in which accident either to the body or accident to the head is a prominent factor. It does not appear that dementia præcox is a disease in which accidents play much part, either in the causation or in the further development of the disease. If that diagnosis can be regarded as so, I should suppose that it could be safely stated that the accident had little or nothing to do with the condition.

However, as you are undoubtedly aware, the diagnosis of the special form which mental disease takes is not infrequently reversed by careful observation. If this patient is suffering from neurasthenia, and the diagnosis neurasthenia can be taken as well founded, I should be inclined to think that the accident had a good deal to do with the development of symptoms. Often a pre-existent neurasthenia can be altered much for the worse by such an event, in my opinion. Everything, accordingly, hangs upon the diagnosis.

To sum up: neurasthenia is stated to have existed for years prior to an accident in a patient who then develops symptoms regarded as those of dementia præcox. One of two things is the case. Either the diagnosis of neurasthenia is correct, and the accident produced such an acceleration of neurasthenia symptoms that the diagnosis dementia præcox was entertained, or else the diagnosis of neurasthenia was in the first place erroneous, and the accident simply intervened in the course of a disease known to be in most cases somewhat progressive.

One might find some alienists who would not agree with the point of accident here adopted, especially since the case touches the difficult field of acute mental disease. My own point of view is the result of such a experience, and I believe it to be the point of view of the best thought of the day. I have re-read the latest work of Kraepelin in answer to your question, and so far as I can see, he would agree with Dr. Dacey's view.

As to what I can do for the Board in this or other cases, I shall do with them where they had been.

Yours very truly,
J. H. Taunton

A letter was also addressed by the chairman to Dr. Arthur V. Goss, superintendent of the Taunton State Hospital, Taunton, Mass., as follows: —

Aaron Lederman, who was committed to the Taunton State Hospital on Dec. 3, 1913, suffering from dementia præcox, and who was discharged on trial against advice on Jan. 18, 1914, is seeking compensation for an injury received on July 7, 1913, when he was precipitated from a bench, which broke under him, to the floor.

On the same day he saw a Boston physician whose certificate says, "He complained of pain in the left inguinal region and of the left side of his chest. By my examination I found skin excoriation on the stomach region and severe pain by pressure on the left side, outside of his navel."

There is no doubt that this man brooded over his injury and that he has been troubled by neurasthenia, and that his mental condition since the accident has grown steadily worse.

Could dementia præcox be caused by any such accident, or by brooding over such an accident, or the accident have been the exciting cause which brought on this mental disturbance and accelerated it much ahead of the time when it would naturally have manifested itself? Any information which you can give me in regard to this matter, or any records which you may have that will throw any light on it, I will deeply appreciate.

Dr. Goss replied to the above letter, as follows: —

Yours of the 5th concerning A. Lederman received. Enclosed please find abstract of his case as requested.

In answer to your question, "Could dementia præcox be caused by any such accident or by brooding over such an accident?" to this I must answer, "No."

To the question, "Could the accident have been the exciting cause which brought on this mental disturbance and accelerated it much ahead of the time when it would naturally have manifested itself?" I would say that it is perfectly possible for an injury to act as an exciting cause in the production of dementia præcox, such injury occurring in a person with a strong predisposition to the disorder. I should feel, however, that it was very improbable that the accident in question, unless more serious than it appears to be from your description, had much if anything to do with producing the condition from which he suffered when admitted to this institution and presumably is suffering now.

The abstract of the case, referred to in the above letter, follows: —

Mr. A. Lederman, having been examined on Nov. 29, 1913, in the Out-patient Department of the Psychopathic Hospital (Boston), hospital

care was recommended and he was sent to this hospital on Dec. 3, 1913. Dr. C. J. Dacey of Brockton, who had signed the temporary-care papers, suggested that the pain in the left side, which had worried the patient, was probably due to intestinal indigestion.

From the patient's brother it was learned that two years ago, following dinner, he had gone to bed, his wife later finding him on the floor, and in explanation he said that he had fainted and felt weak. A table near by had a large piece of the edge broken off, and it was assumed that in falling he had struck his head against it. Aside from complaining of pains in the lung and kidneys, the occurrence appeared to have caused him no inconvenience. On July 7, 1913, it is said that while at work he stepped on the edge of a bench, and upsetting it fell to the floor, striking on his left side. He fainted and vomited, but felt well enough to resume work the next day, and continued until Oct. 6, 1913, when he stopped working. He then complained about his side and worried about his accident insurance.

On admission Mr. Lederman was mute, mildly resistive, remained in bed in a fixed attitude, and for the first two days refused all nourishment.

Physical examination revealed no abdominal deformity and palpation elicited no pain.

He remained without much change until about Christmas time, after which there was gradual and noticeable improvement.

On Jan. 18, 1914, he was, against advice, discharged on trial, there remaining at that time only slight mental dullness and apathy.

Lederman resumed work on July 8, the day after the accident, and continued to work until Oct. 6, 1913, when he stopped working.

In view of the preponderance of the medical testimony in the case, and all the circumstances surrounding it, we find that Aaron Lederman received an injury while in the course of his employment on July 7, 1913; that this injury, comparatively slight so far as the medical evidence submitted shows, produced in him a mental condition which accelerated a neurasthenia, which had existed, according to the testimony, for years, to such a degree that it absorbed his entire thoughts, and this neurasthenia was altered for the worse and symptoms regarded as those of dementia præcox developed.

We find that his average weekly wage was \$18, and that he is entitled to compensation at the rate of \$9 a week from Oct. 6, 1913, until the date of the hearing, and to such further time as he is able to resume his work.

This decision and all findings regarding compensation or the existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III., of the Workmen's Compensation Act, and the general provisions of said Act and its amendments.

DUDLEY M. HOLMAN.
H. M. SCHAUB.

Everett E. Arey dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties and their witnesses at the Hearing Room of the Board, New Albion Building, Boston, Mass., on Wednesday, June 10, 1914, at 9.30 A.M., and finds and decides as follows: —

All the evidence introduced at the hearing on review was new, and none of the witnesses who testified before the Industrial Accident Board appeared before the committee of arbitration.

The employee is now incapacitated for work by reason of dementia præcox. The evidence of Dr. Raoul J. Provost, Dr. J. W. Courtney and Dr. H. R. Stedman, called by the insurer, and of Dr. Elmer E. Southard, the impartial expert called by the Industrial Accident Board, was substantially the same, that the personal injury received, as reported by the committee of arbitration, did not cause or accelerate the condition of dementia præcox from which the employee, Aaron Lederman, is now suffering.

The Industrial Accident Board therefore finds, upon all the evidence, that the personal injury received by the employee on July 7, 1913, while in the employ of the subscriber, the Diamond Shoe Company, did not incapacitate him for work, and no compensation is due the said employee from the insurer, the Standard Accident Insurance Company.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
EDW. F. MCSWEENEY.

CASE No. 658.

THOMAS FINNEGAN, *Employee*.

MICHAEL F. DONOVAN, *Employer*.

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., *Insurer*.

AVERAGE WEEKLY WAGES OF LONGSHOREMEN WHO WORK
FOR MORE THAN ONE EMPLOYER FIXED AT \$15. INSURER
APPEALS TO SUPREME JUDICIAL COURT.

The evidence showed that longshoremen generally, such as the employee, earn an average minimum weekly wage of \$15, and that this is the average which the ordinary industrious longshoreman, working for two or more employers, earns during the course of a week. The custom in that occupation is to work for one employer until the ship is loaded or unloaded, and then to proceed to another place of employment and remain until the work is completed.

Held, that the average weekly wages of the employee are \$15.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to the Supreme Judicial Court.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Thomas Finnegan *v.* Employers' Liability Assurance Corporation, Ltd., this being case No. 658 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Edward F. McSweeney of the Industrial Accident Board, chairman, Henry R. Brigham, Esq., of 92 State Street, Boston, representing the employee, and Martin Connolly, Esq., of 8 Congress Street, Boston, representing the insurer, heard the parties and their witnesses in the Hearing Room of the Industrial Accident Board, on Tuesday, March 31, 1914, at 2 P.M.

John Morrison, Esq., appeared as counsel for insurer and George I. Warren, Esq., for employee.

It appears from the evidence in this case that Thomas Finnegan, forty-five years of age, residence, Charlestown, was employed as a longshoreman by Michael F. Donovan, at Pier 42, Water Street, Charlestown. His business was loading cars. He was a time-worker, his average weekly wage being in dis-

pute. On Sept. 8, 1913, while at work, Finnegan was struck by a load of ties swinging out from the ship, knocking him to the ground, breaking certain ribs and collarbone, with other injuries.

The questions at issue in this case are the average weekly wage and the period of disability.

In regard to the length of disability, it was agreed by the attorney for the insurer and the employee's representative that the injured man should be examined by an impartial physician. Dr. Frederick J. Cotton was agreed on by both parties as an impartial physician to make an examination of the injured man, and report.

Regarding the average weekly wage, Mr. Morrison, attorney for the insurer, claimed that \$12 was a fair average weekly wage for longshoremen, while the injured man, Finnegan, claimed that his average weekly wage was not less than \$15 a week. The insurer further claimed that Finnegan had signed a paper on January 27 in which he agreed to continue to accept compensation on the basis of a \$12 average weekly wage, and did not desire the case to go to arbitration. Mr. Finnegan testified that at the time he signed this paper he had never said to anybody that his average weekly wage was \$12 a week. He never kept a record of his wages, but he knew that his average wage was over \$15. He had a large family, and if he only earned \$12 a week he could not have supported them. He knew the paper he signed wasn't right, but he thought that by signing it he would get his compensation.

Mr. W. R. Blaisdell of the Eastern Steamship Company testified he employed about 200 men. These men were coastwise longshoremen. This class of men do not earn as high a rate of wages as deep-sea longshoremen, but the work is more steady. Mr. Blaisdell further testified that taking 100 coastwise longshoremen, the average earnings would be \$12 a week, exclusive of overtime; taking overtime earnings into account, the average weekly wage of coastwise longshoremen would be between \$13 and \$14.

Mr. A. J. McCarthy, auditor of the International Mercantile Marine Company, testified that about 300 longshoremen are employed by this concern. He could not give the actual wages

earned by different longshoremen, because they varied according to the individual longshoreman's willingness to work. One man might earn \$40 a week, while another man might not earn more than \$1. An exceptionally industrious longshoreman might make as high as \$20 or \$22. Some men are ambitious to make good money, while others are content to make just enough to pay their board. If a man has a family to support he can usually find enough work to keep him busy. If there is nothing to do on one dock, he gets work on another. Taking the good and the bad longshoremen together, the average wage, in his opinion, might be about \$13.

Mr. Charles Stewart of the Cunard Steamship Company testified that the records of the last four ships which came into port show the average weekly wage of longshoremen from \$9.72 to \$11.84; these men did not work steadily. Men earning \$9.72 worked twenty-nine hours; the rest of the time they might have been working for other steamship companies. The longshoremen who made \$11.84 worked three days and some overtime. In his opinion the average wage of a longshoreman working for his company alone would be \$12, but longshoremen employed by the Leyland line might make \$15, because the Leyland line works more regularly than the other lines.

Mr. F. O. Booth of Boston testified that he had been working for his father for the past five years, his father having been in the stevedoring business for twenty years. If longshoremen would get work wherever they could, they would make a good salary, but some of them won't do this. In his opinion a fair average wage for all longshoremen would be \$12 a week, but good longshoremen make more. Taking in all the longshoremen working for his father, he thought \$12 was the average wage. The poor ones, however, bring this average way down.

Mr. Frank Cartone, another employee of Mr. Booth, thought that a man might average \$12 a week as a longshoreman. The wages of 9 men working for Mr. Booth were drawn off for thirty-one weeks, and the average wage of longshoremen was \$10.63. The men working for Mr. Booth often start in the morning and are knocked off again, and instead of looking for work elsewhere, they wait at the gate until they are called

again. As a rule, there are certain longshoremen that Mr. Booth hires.

Mr. Edward Stevens of Charlestown testified he has been a longshoreman for twenty-eight years, and considers his average weekly wage would be \$18. According to a personal wage record which he submitted, last year he earned \$901. There are 1,600 longshoremen in Boston, and all are union men. A deep-sea longshoreman is paid 33 cents an hour, with 50 cents an hour for regular overtime, and 60 cents an hour from Saturday night until 6 o'clock Sunday. Mr. Stevens came to the hearing representing three locals of the International Longshoremen Associated, Nos. 799, 800 and 805. As regards their earning capacity, he divided longshoremen into four classes: first, those making under \$15 a week; second, those making \$15 to \$17.50 a week; third, those making \$17.50 to \$20; fourth, those making \$20 and over. In his opinion the \$17.50 class is the largest of all.

Mr. William F. Dempsey, 702 East 6th Street, South Boston, testified that in 1912 there was a longshoremen's strike, and it was then agreed, at a meeting in the Chamber of Commerce Building, that the average weekly wage of a longshoreman in Boston was \$12. As a result of this strike the regular wages of longshoremen were increased from 30 to 33 cents an hour, and from 40 and 45 cents an hour to 50 cents an hour for overtime.

The difficulty of ascertaining wages under the Workmen's Compensation Act seems to be greater in the occupation of longshoremen than any other. It required a decision by the Supreme Judicial Court of Massachusetts in the case of *Gillen v. Ocean Acc. and Guar. Corp. Ltd.*, 1 M. W. C. C., 145, to overthrow the contention of the insurance company that a longshoreman is entitled to receive in compensation only one-half of the wages he receives from the employer for whom he was working at the time of the injury, and is entitled to receive compensation based upon the average wages earned by him while working as longshoreman for different employers.

It appears from the testimony in this case that deep-sea longshoremen are all organized; that hourly wages for all are

the same; that some longshoremen do, on occasion, earn as much as \$40 and upwards a week, and others, due to their unwillingness to work, earn very low weekly wages. The very nature of longshoremen's work makes it full of temptation to the worker in this occupation. He must work for many employers. The work is laborious in the extreme. His work may terminate a few hours after being employed on a given job. It may terminate at such a time of the day as will require the industrious worker to seek another job to finish out the day. Hanging around the docks, seeking work, offers constant temptation to the unambitious man or to the worker who is not spurred by the necessity of supporting his family. Under the circumstances it would seem most unfair to an industrious man who personally averages a minimum wage of \$15, and who has been injured in his employment, to be forced to depend for support for his family and himself, during disability, on one-half of \$12, or \$6 a week, because certain of his fellow workmen succumb to conditions peculiar to the longshoreman's occupation, and thus reduce the average wage of the mass of longshoremen.

It would be contrary to the spirit of the act to allow the low earnings of this class of workers to operate to the disadvantage of injured industrious workmen, who, in the spirit of the act, are entitled to have a recognition of the principle that they are entitled, when injured, to one-half of their actual wage. At the time of the 10 per cent. raise in longshoremen's wages in 1912, the accepted average wage prior to the strike was \$12, which meant also the average of all longshoremen, industrious and otherwise. Even this means an advance in wages for all longshoremen, industrious and otherwise, of from \$12 to \$13.20 a week.

On May 13, 1913, the Industrial Accident Board, after an investigation on this special matter of longshoremen's wages, decided that, in the absence of evidence to the contrary, the wages of longshoremen should be computed at the rate of \$15 a week, when agreements in relation to compensation are made. If the actual average weekly wages of the longshoreman whose compensation is in dispute, as computed from the amount

earned by him from all employers, indicates a higher or lower average, then the agreements should be made on that basis.

The only official figures of wages of longshoremen published in this country, which the arbitrators are able to find, are those of the New York Bureau of Labor. In its report of 1912 is shown the difference in the number of hours worked and the amount of wages received by longshoremen in the same district. For six months in 1912 the average earnings of longshoremen in Brooklyn were 36 cents an hour, in Manhattan, 63 cents an hour. Average for the two sections is 60 cents. The actual earnings, not considering the time lost, in Brooklyn were $23\frac{1}{2}$ cents, and in Manhattan, $28\frac{1}{2}$ cents; for both sections, 28 cents.

Applying these rates on a fifty-eight-hour-week basis, the average actual earnings in both sections would be \$16.24 a week, and allowing for lost time, \$34.80. In this case all the testimony is to the fact that Finnegan is an industrious longshoreman, and no evidence has been offered by the insurer that his average weekly wage as a longshoreman has been less than \$15 a week.

Regarding the question of disability, Dr. Frederic J. Cotton reports as follows: —

Examination of Thomas Finnegan.

Examined this man in my office on April 4, 1914, at the request of the Industrial Accident Board.

Occupation, longshoreman. Age, 45 years. Height, 5 feet $11\frac{3}{4}$ inches. Weight, about 160 pounds.

History: accident happened Sept. 9, 1913. Says he was struck by a load of about 9 railroad ties that were dropped from a boom. Struck him in the back and knocked him unconscious, he says. Taken to the Relief Station; stayed there about three days, and at the City Hospital for the remainder of a week. Was an out-patient for a time. Since then in the care of Dr. John O'Brien of Charlestown.

Says his back is still pretty lame, and has some pains in his right leg; also says his shoulder is lame, and he is unable to do anything heavy with it on account of the pain caused by attempting it. He says that he had a dislocated collarbone, broken ribs and a sprained back.

Physical examination: tall, powerful man, now in poor muscular condition. His back shows nothing objective. The tenderness complained of is mainly to the right of the lumbar spine. I cannot now find anything

objective where he said the ribs were broken, but this is not unusual — rather the rule. The right leg shows nothing objective in tenderness of the sciatic nerve. There is no sacroiliac condition. The right shoulder shows a dislocation of the outer end of the clavicle, of the second degree.

With the shoulder displaced about $1\frac{1}{2}$ inches downward, and quite a little inward, this man is unable to work; there is no doubt about it. His back is sprained, or has been, but I think is going to recover in time. The shoulder is not going to recover, and probably is not going to improve very much, unless operation is done.

The condition is one definitely relievable by operation.

F. J. COTTON.

The arbitrators find that Thomas Finnegan was disabled from labor by reason of an injury arising out of and in the course of his employment, and that said disability still continues.

From the preponderance of the testimony the arbitrators find that the average weekly wage of an industrious longshoreman in Boston is not less than \$15 a week, and that with the 10 per cent. increase in wages following the strike in 1912 the average weekly wage of *all* longshoremen, industrious and otherwise, is not less than \$13.20 per week.

The arbitrators further find that the evidence shows Thomas Finnegan is an industrious longshoreman, whose average weekly wage is not less than \$15 a week, and he is entitled to reasonable medical and hospital services for the two weeks following the injury, and to total disability compensation at the rate of \$7.50 a week, this being one-half his average weekly wage of \$15, from the fifteenth day after the injury to Dec. 15, 1913, when he began work as a flagman for the Boston & Maine Railroad at \$9 a week, amounting to twelve weeks, making a total of \$90, from which amount must be deducted the amount of money paid Finnegan for disability payments by the Employers' Liability Assurance Corporation, Ltd. Finnegan is entitled to partial incapacity compensation based on the difference between his earnings in his former employment and his reduced earnings, due to the injury, in his present employment, this being \$6, the difference between \$15 and \$9 a week, or \$3 a week from Dec. 15, 1913, while partial incapacity continues.

This decision and all findings regarding compensation or the existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the

facts warrant such action, in accordance with section 12, Part III., of the Workmen's Compensation Act, and the general provisions of said act and its amendments.

EDW. F. MCSWEENEY.

HENRY R. BRIGHAM.

Martin F. Connolly dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties in the Hearing Room, New Albion Building, on Thursday, June 4, 1914, at 11 A.M., and affirms and adopts the findings and decision of the committee of arbitration.

The question involved in this case is the average weekly wages of longshoremen, and of the employee in particular. This point has been in dispute for a long period of time, and the hearing in the above case was requested by the employee to definitely determine the question.

The Board further finds that longshoremen generally, such as the employee, Finnegan, earn an average minimum weekly wage of \$15; that this average wage is obtained as the result of earnings from two or more employers during the course of a week, the custom in that occupation being to work for one employer until the ship is loaded or unloaded, and then to proceed to another place of employment and continue to perform the work offered. This finding does not affect the compensation due longshoremen who work only for one employer, and whose average weekly wage may be readily learned by obtaining a record of said employment from the books of the employer; nor does it affect the compensation due under the statute to longshoremen whose wages working for various employers during the course of a year may be accurately ascertained. It is intended to apply only to longshoremen of the type of the said Finnegan, who are industrious, and in the course of their employment as longshoremen work for more than one employer, and earn an average of \$15 weekly. It is difficult, in the ordinary case, to obtain an accurate record of the wages earned by longshoremen who go from dock to dock

in search of employment, and the Board is of the opinion that the average set forth in this finding is the average minimum earned by that type of employee.

The Board therefore finds that there is due the said employee a reasonable allowance for medical and hospital services during the first two weeks after the injury, and compensation, based upon a weekly payment of \$7.50, during his total incapacity for work, from Sept. 22, 1913, to Dec. 15, 1913, upon which latter date the incapacity for work became partial, and the employee began to earn wages at the rate of \$9 weekly; that there is due the employee a weekly payment of \$3 from Dec. 15, 1913, to June 4, 1914, said partial incapacity continuing, less the compensation previously paid by the insurer.

At the request of the insurer the accompanying signed statement is attached and made a part of this record.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

APRIL 14, 1914.

I, Thomas Finnigan, of Sackford Street, Charlestown, am the father of five children, two boys and three girls; the oldest one, a girl named Margaret, works in the Magrane-Houston Co. Department Store as a bundle girl, receiving \$3.50 per week. This \$3.50, together with my weekly compensation from the Employers' Liability Assurance Corporation, Ltd., plus a few dollars that my wife can earn, working as wash-woman, is the only financial support that I have. I have not done any work since my injury on Sept. 8, 1913, and in order that I might be less troubled, desire that I be paid a lump sum which would end the trouble of going over to Broad Street to get my money.

his
(Signed) THOMAS X FINNEGAN.
mark

Witnessed:

EDWARD F. O'SHEA, Jr.
JAMES F. ST. JOHN.

CASE No. 663.

JOHN WHITE, *Employee*.

R. S. BRINE TRANSPORTATION COMPANY, *Employer*.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *Insurer*.

SERIOUS AND WILLFUL MISCONDUCT OF THE EMPLOYEE BY
REASON OF INTOXICATION CAUSES PERSONAL INJURY.

The evidence showed that the employee was intoxicated when he started to drive his horses and did drive his horses and wagon up the incline into the barn; that he was so intoxicated that he had lost his normal and ordinary senses of observation, understanding and judgment, so that he could not appreciate the operation of ordinary causes and effects with which he was fully familiar, and that his injury was caused by reason of this intoxicated condition. He had voluntarily drunk the liquor to the extent of causing such intoxication while on duty.

Held, that the employee was not entitled to compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of John White *v.* Fidelity and Deposit Company, this being case No. 663 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of David T. Dickinson of the Industrial Accident Board, chairman, J. W. Derosia for the employee and Addison M. Goldsmith for the insurer, being duly sworn, heard the parties and their witnesses at the Hearing Room of the Industrial Accident Board, New Albion Building, Boston, Mass., Tuesday, Jan. 27, 1914, at 10 A.M.

The question in this case was whether the employee, who was injured in the course of and arising out of his employment, received the injury by reason of his serious and willful misconduct. If so, he is not entitled to compensation.

The employee is a teamster, and was in the employ of R. S. Brine Transportation Company, 43 India Street, Boston. He received the injury while driving a pair of horses attached to a wagon heavily loaded with bales of wool into the employer's barn. He had driven the load from East Boston. The accident occurred about quarter to 7 o'clock P.M., Dec. 1, 1913. He testified that he had taken about four or five drinks on that

day, including whiskey and beer, and that to drink about this amount was his usual daily practice.

He sat on the top of the load of cotton bales when driving, and he testified that the top of the bales, on the level where he sat, was a position about 3 feet higher than he had ever driven the wagon from before. He had driven this or other wagons into the barn, when the elevation at which he sat was about 3 feet lower, many times, and he was familiar with the driveway into the barn and its interior, from working and driving into it daily for the larger part of about two years. The driveway into the barn was on a rising incline beginning outside the barn door, and continuing for some distance inside the barn, so that the farther he drove into the barn the nearer the top of his head would come to the ceiling. In the case of a wagon loaded about 3 feet lower, his head would come within about 6 inches of the ceiling after he had entered the barn, until he got about 15 feet inside the barn, measured in a straight line from the barn door. When seated on a level about 3 feet higher, as was the case at the time of the accident, his body and head would be sure to be jammed on driving into the barn against the ceiling and the crossbeam, which supported the ceiling.

On the night in question, when he arrived at the barn, at about quarter to 7, and when the inside of the barn was plainly lighted, he started up his horses and drove them, with this extra high load attached, up the incline into the barn and across the above-mentioned space of about 15 feet, striking and squeezing his body against this beam. At this time there was only a space of about 6 inches between the top of this load and the bottom of this beam. The employee was thrown back upon and between two bales of cotton, and the foreman seized and stopped the horses and prevented his being further injured. This foreman, seeing the danger of this employee when he started to drive up the incline into the barn, and knowing that he must strike against the ceiling and beam, shouted at once, loudly, for him to stop before he got the horses into the barn.

When the employee got down from the wagon load, which was practically at once after his accident, he appeared to Robert S. Brine, who then took charge of his horses, to be

intoxicated. From his manner and his continued talking his mind appeared to Mr. Brine to be much affected by liquor, and he, Brine, finally told him to leave the barn or he would get an officer. The evidence did not show, however, that his walk or gait was affected, and a physician who attended him at his home soon after testified that he noticed no signs of liquor about him. Mr. Brine and a witness named George F. Caulfield testified that they had seen the employee driving the horses and loaded wagon not far from the South Station, Boston, toward the barn earlier in the evening, and that the employee was very late, in covering the short distance, a little more than a mile, to arrive at the barn.

On the weight of all the evidence the committee finds that the employee was intoxicated when he started to drive his horses and did drive the horses and wagon up the incline into the barn; that he was so intoxicated that he had lost his normal and ordinary senses of observation, understanding and judgment, so that he could not appreciate the operation of ordinary causes and effects with which he was fully familiar; and that his injury was caused by reason of this intoxicated condition. As he had voluntarily drunk the liquor to the extent of causing such intoxication while on duty, the committee finds that his injury was caused by reason of his serious and willful misconduct, and he is therefore not entitled to compensation under the provisions of the Compensation Act.

The testimony of his physician, Dr. Robert R. Rothwell, shows that he ruptured his left kidney in the accident, but that he apparently made a wonderful recovery, and at the time of the hearing appeared to be able to return to work. There was at the time of the hearing no apparent incapacity except the employee's own fear of injuring himself by so returning. The doctor testified that it would be well for him to start in moderately, avoiding heavy lifting, and if he noticed no signs of trouble as he went along it would probably mean that he would be sound and well in the course of about two weeks.

No finding, however, is made as to incapacity.

DAVID T. DICKINSON.
ADDISON M. GOLDSMITH.
J. W. DEROSIA.

CASE No. 672.

MARY DRISCOLL, *Employee.*

DURGIN PARK COMPANY, *Employer.*

LONDON GUARANTEE AND ACCIDENT COMPANY, LTD., *Insurer.*

EMPLOYEE WHO RECEIVED PERSONAL INJURY WHILE ENTERING
PLACE OF EMPLOYMENT ENTITLED TO COMPENSATION.
CASE APPEALED TO SUPREME JUDICIAL COURT.

The employee, in order to enter her place of employment, was required to use the flight of stairs upon which she received the injury. It was her custom, before actually beginning the work of the day, to partake of breakfast, this custom being known to her employer and recognized by it as a collateral part of the contract of hire, the employee receiving as remuneration for her work "\$5 a week and meals." She had arrived on the premises at an hour which allowed only a reasonable period in which to eat her morning meal before the time set for beginning the actual work of the day.

Held, that the employee was entitled to compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appeal to Supreme Judicial Court.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Mary Driscoll *v.* London Guarantee and Accident Company, Ltd., this being case No. 672 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Edward F. McSweeney of the Industrial Accident Board, chairman, N. P. Sippelle of 6 Beacon Street, Boston, representing the insurer, and Thomas H. Mahony of 15 Beacon Street, Boston, Mass., representing the employee, heard the parties and their witnesses at the Hearing Room of the Industrial Accident Board, New Albion Building, Boston, Mass., Tuesday, Feb. 10, 1914, at 10 A.M.

The agreed facts are as follows: Mary Driscoll was, on Dec. 1, 1913, employed by the Durgin Park Company in the laundry of her employer's restaurant. Her wages were \$5 per week and meals, the average weekly wage being estimated at \$8 per

week. The Durgin Park Company is insured under the Workmen's Compensation Act by the London Guarantee and Accident Company. Miss Driscoll left her house in Charlestown on the morning of Dec. 1, 1913, without breakfast, and reached the premises of her employer some time after 7 o'clock. She was proceeding up the main stairs to the restaurant when for some reason she fell and fractured her arm. It appears from the testimony that she had not been feeling well the day before, but there was no evidence that the fall was due to fainting spell or dizziness. It further appears that while the time of beginning her work was 7.30, it was her custom on entering to get a cup of coffee from the urn and take it, with a doughnut or some other refreshment, up to the third floor, and eat it before going to work.

From these facts the arbitrators find that the injury to Mary Driscoll arose out of and in the course of her employment; that she is entitled to reasonable medical and hospital bills for two weeks following the injury, and to compensation at one-half the average weekly wage of \$8 a week from the fourteenth day after the accident until the date of this hearing, or eight and one-seventh weeks, at \$4 per week, or \$32.57, it being understood that Mr. Chandler, her employer, is to give her work; and if she cannot perform this work, the matter of additional compensation to the above can be considered and adjusted subsequently.

EDW. F. MCSWEENEY.

N. P. SIPPRELLE.

THOMAS H. MAHONY.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties on Thursday, March 12, 1914, at 10 A.M., in the Hearing Room, New Albion Building, Boston, Mass., and affirms and adopts the findings of the committee of arbitration.

The agreed facts are as stated in the report of the committee of arbitration.

The Board finds upon these facts that it was an implied part of the contract of employment of the employee, Mary

Driscoll, to use the flight of stairs upon which she received the personal injury which incapacitated her for work, these stairs being on the premises of her employer and being the only means of entrance to and exit from said premises. It was her custom, before actually beginning the work of the day, to partake of breakfast, this custom being known to her employer and recognized by it as a collateral part of the contract of hire, the employee receiving as remuneration for her work "\$5 a week and meals." She had arrived on the premises at an hour which allowed only a reasonable period in which to eat her morning meal before the time set for beginning the actual work of the day.

The English cases hold that the moment of beginning the actual work is not the true test as to the time when employment begins, and if an employee is on the premises before he actually begins his work, and during that time an injury occurs, it arises out of and in the course of the employment. (*Fitzpatrick v. Hindley Field Colliery Co.*, 4 W. C. C. 7; *Mackenzie v. Coltness Iron Co. Ltd.*, 41 S. L. R. 6; *Sharp v. Johnson & Co. Ltd.*, 7 W. C. C. 28; *Blovelt v. Sawyer*, 6 W. C. C. 16. Massachusetts cases in point are: *Olsen v. Andrews*, 168 Mass. 261; *Kilduff, Admr. v. Boston Elevated Ry. Co.*, 195 Mass. 307.)

The Board finds that the said employee received a personal injury arising out of and in the course of her employment on Dec. 1, 1913; that she is entitled to a reasonable allowance for medical and hospital services during the first two weeks after the injury, and to compensation at the rate of \$4 weekly from Dec. 15, 1913, to Feb. 10, 1914, a period of eight and one-seventh weeks, making the total amount due \$32.57, further compensation to be paid said employee in accordance with the provisions of the act, depending upon her ability to perform the work which her employers agree to provide.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 675.

ANDREW COOPER, *Employee.*

BAY STATE STREET RAILWAY COMPANY, *Employer.*

MASSACHUSETTS EMPLOYEES INSURANCE ASSOCIATION, *Insurer.*

NEPHRITIS AND BLINDNESS CAUSED BY VIOLENCE AND ELECTRIC SHOCK INCAPACITATE EMPLOYEE. COMPENSATION AWARDED.

The evidence showed that the employee was working on a construction car when the trolley wire broke, causing the boom at the end of the trolley pole to strike him. This blow, together with a shock of electricity from the wire, incapacitated him for work and brought on a condition of acute nephritis and loss of vision.

Held, that the employee was entitled to compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Andrew Cooper v. Massachusetts Employees Insurance Association, this being case No. 675 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Dudley M. Holman of the Industrial Accident Board, chairman, Hon. John B. Tracy of Taunton, Mass., representing the employee, and John C. Jones, Jr., Esq., of Boston, Mass., representing the insurer, heard the parties and their witnesses in the Aldermanic Chamber, City Hall, Taunton, Mass., on Wednesday, Feb. 18, 1914, at 2 P.M.

Richard P. Coughlin and Leo H. Coughlin represented the employee, and John W. Cronin, Esq., represented the insurer.

The evidence showed that Andrew Cooper, living in Taunton, Mass., thirty-three years of age, was employed as a lineman by the defendant railway company, and had been employed as a lineman for several years before the accident, and had worked for this defendant company for six or seven months prior to Dec. 16, 1912, the date of the accident in question; that at the time of the accident his average weekly wage was \$15.90.

Andrew Cooper testified that he was working in the Lake-

ville district on a construction car which had a raised table on top. With him, working on the car, were Joseph Morgan, a motorman, and Antone Marshall, who was working on the table with Cooper. This table was about 16 to 18 feet from the level of the street. They were at the time putting a piece of span over the splicing on the trolley wire. The trolley pole, at the time, was on the wire, and just before the accident Cooper was in the act of sandpapering the trolley wire, getting it ready for Mr. Marshall to put the protectors on the span wire. Projecting from the end of the trolley pole is a boom, so called, projecting back 6 or 8 feet. When the trolley wire broke the boom swung around toward the right, brushing against Cooper, who grabbed it in his hands to protect his chest, and the boom struck him. His back at the time was against the trolley wire, and he remembers falling from the table and hearing Morgan cry out, and then became unconscious. The next thing he remembered was that he was very sick and vomiting, and that his shoulder was swelling; that he was black and blue from the shoulder to the ankle on the left side; he was unable to turn or move about; his head was very dizzy, and at that time he had periods of unconsciousness, and he thought he was paralyzed. He was afterwards taken into the car and carried to the car barn in Lakeville, and was attended by a physician there. He was in the car about three-quarters of an hour; during this time he was unable to move and in terrible pain, and was sent home in an automobile. The accident occurred about 1.30 P.M. and he reached home about 3.45 P.M. He was treated that day by Dr. Charles A. Atwood, physician for the insurer, who treated him for ten days succeeding. He remained in bed about ten days. During that time he was in pain, suffering from injury to his arm and back, and he noticed the tenth day that his urine was discolored and rather sluggish. When he got up he was weak, his shoulder and back very sore, and his left hand appeared to be paralyzed as well as his leg from the knee down, which was cold. About a month after the accident he was able to go out and improved. He went to Boston and was examined by the insurer's physician the latter part of the third month, and again the latter part of the fourth month, after the accident,

and was in the same general condition, but improved somewhat, so that during the second week in April he went to work, although not feeling in condition to work. His work at this time was stenciling poles, which kept him in the open air. Later his sight began to fail and his back was sore for months during that time. He worked at stenciling for about three weeks and then assisted in digging holes, pulling ropes, etc. His eyesight continued to fail and he had severe pain in his head, felt dizzy, and hot flashes would come over him; his shoulder improved. He gave up work on October 23, his condition being very bad. During this time of employment he received \$9 a week.

In June he consulted Dr. Joseph B. Murphy, who treated him for his back and his eyesight. His eyesight continued to fail, his legs continued to swell, and he became weaker, and on October 23 he went to see Dr. Andrew J. McGraw. The pains in his head continued, the swelling decreased and his eyesight continued to fail, so much so, that a week after Thanksgiving his eyesight completely failed, so that he could not tell daylight from dark, and at the time of the hearing was totally blind.

Before the accident he was perfectly well, never having occasion to have a physician, and worked constantly at his occupation of lineman, and never had any trouble with his eyesight, nor pains in his back, arms or legs. He further testified that at the time of the accident he was between the pole and the wire, and that the boom and the wire were on the same side of the line. When the boom broke he grabbed the short end and the long end was on the field side. He was hard up against the wire, and when it broke the whole weight went back against the boom and the wire. When the wire broke the boom struck out towards the place where Cooper was standing and struck him, and he was conscious of falling and thinks he received an electric shock.

Antone Marshall testified that he was working with Cooper in Freetown and was on the table with him; that below was a stone wall inclosing the field; at that place the road runs north and south, and that the car at that time was on the east side, and they were about 3 feet from the edge of the street. When

the boom swung, Cooper grabbed the boom and it pushed him off the table, so that he fell inside the wall in the field. He was unable to state whether or not Cooper struck the wall. After Cooper fell, Morgan jumped from the car and picked him up. He could not move and was unconscious. His face was bleeding somewhat. A car was telephoned for, and he was sent to the car barn. The pole, after the fall, was inside the wall, and the boom swung around toward the pole and broke off. When the wire broke it fell down with the boom where it was connected with it, and Cooper had hold of the boom itself, and when he was on the ground after the fall he still had hold of the boom, as when he picked the boom up he noticed that Cooper's hands were clutched around the boom, so that Morgan had to take them off.

Joseph Morgan testified that he was working inside the car getting a torch ready for use, when he saw Cooper holding on to the boom and fall off the car into the field, and he took the boom from him and noticed marks on his face. He saw him very sick and vomiting while he was there, and was there until he was carried into the car barn. He saw him have hold of the boom, the breaking of the wire causing it to swing, pushing him down with the boom, and he took Cooper's hands off the boom. At the time they were working on the wire there were about 510 volts of electricity in it.

Evidence was produced by Charles Buffum, an electrician and lineman of thirty-five years' experience, who was familiar with the conditions upon said car. He stated that the wire was almost sure to catch Cooper in the back, and he was practically sure to get an electric shock.

Dr. Joseph B. Murphy testified that in his opinion Cooper was suffering from acute nephritis caused by violence, coupled with an electric shock, a condition that is incurable; that his blindness was caused probably by the electric shock, causing kidney trouble leading to his blindness; that his kidney trouble is incurable; and that his blindness is incurable. He further testified that his present condition was attributable solely to the accident; that there was no question, in his mind, from the presence of the bloody casts in the urine, and from the general conditions which he found, that the man had suffered an elec-

tric shock, together with exposure and the blow which he received in the fall, causing this incurable condition.

Dr. Frank A. Hubbard, who was sent by the Industrial Accident Board to examine the petitioner, an impartial physician, reported and testified that he found Cooper in a bad condition, tending to minimize rather than exaggerate his troubles; that he found him suffering from chronic nephritis, and that in his opinion this was due solely to the accident; that his blindness is incurable; and that his kidney trouble is practically hopeless. He further testified that he was familiar with Osler, and that he still thought that this condition present was caused by the accident, and testified as follows: —

Q. (by Mr. COUGHLIN). From the discourse you have just heard, I assume that overeating and overdrinking and leading a strenuous life cause chronic interstitial nephritis. Have you seen any overeating and overdrinking in that man? A. No.

Q. And the sclerotic condition in men over forty. He is not over forty? A. I think not.

Q. He testified thirty-three. Did you see anything in the situation that you had before you when you examined him compared with anything read by the learned counsel — any of the conditions or situations that were read by him? Did they exist when you examined Cooper — overeating, overdrinking or any of those conditions present? A. I think not.

Q. You say at that time he had chronic nephritis. Could you tell how long it had existed? A. I could not.

Q. You think from the time of the accident? A. I think that is true.

Q. There is no doubt about that? A. I think that is true.

Q. (by Mr. CRONIN). Whether or not you knew the condition of his kidneys before the accident? A. I did not know what it was before the accident. If I had known that they were not in perfect condition previous to the accident I would say that the accident had accelerated the diseased process and brought it out more fully, because the man was entirely able to do a hard day's work previous to that, and immediately after the accident he was disabled and hasn't been well since.

Q. But that would be on the assumption that the disability proceeded from the kidneys, and was referred to that? A. A large part of the disability, the most of the disability, proceeded from the kidneys, but there was also the arm. Of course the kidneys had, as sequence, the head symptoms and the eyes and the swelling of the feet and legs.

Q. Assuming that the main complaint over the first three or four months was this arm condition, — this limitation of motion in the shoulder, — and that he made no direct complaints of kidney trouble or the condition

of the urine during the first five months or so, would that alter your opinion any, Doctor? A. I don't think it would, because kidney trouble can come in very insidiously, and it frequently does come on almost imperceptibly.

Q. And it can come on entirely apart from any trauma or shock of that sort? A. It does sometimes.

Q. And it does frequently come on from exposure and poison in the kidneys? A. Yes, it does.

Q. And if that came on, Doctor, or if there was no complaint of any blood in the urine or anything of that sort, no history, during the first six months, of trouble with the kidneys during that time, will you still believe that coming on six months afterwards it could be caused by the accident if appearing six months afterwards? A. Yes. But that form of disease is generally very slow in appearing, and by the time you know it exists it has already been working and gaining headway for some time, so that when you find the disease it has already been there for some time, very likely without the knowledge of the individual.

Q. Do you still feel, Dr. Osler to the contrary notwithstanding, that violence can cause this form of nephritis? A. I feel so.

Q. And do you feel that violence can cause that kind of nephritis without operating directly upon the kidneys, so as to produce a bleeding at once within a few days? A. I separate that in two parts. I think there would necessarily have to be violence directly communicating to the kidneys. I don't think a man would get an injury to the kidneys of this sort by just sitting down, but he was thrown against a stone wall, striking the back and shoulder against a stone wall, and I think that was direct violence. In that case there might or might not have been blood in the urine. If there had been, I should say it was an acute condition at first. But the condition I saw was a later condition.

Q. Would it affect your opinion if he just fell to the field and did not strike the stone wall? A. He would have to strike violently on his back.

Q. Assuming that the evidence was that the man fell inside of the stone wall onto the ground, and fell on his left side, — whether violence of that sort, without blood appearing in the urine at once, was such violence as would produce this form of nephritis, in your opinion? A. I should think so.

Q. You wouldn't feel that blood need appear in the first week or two? A. Not necessarily. It might, but not necessarily.

Q. You would be sure of that diagnosis if it had appeared? A. Yes. You would be sure that it was an acute condition first.

Q. You are in general practice here, rather than a specialist on kidney trouble? A. I am in general practice, leaning towards surgery. I am not a specialist in kidney troubles.

Q. (by Mr. HOLMAN). In case this man had had an incipient form of kidney trouble and didn't know it, and he had this fall, — striking on the

ground, — and immediately after that he began to have symptoms showing kidney trouble, should you say that the exciting cause of that trouble was the fall? A. The exciting cause of exaggerating the trouble would be the fall.

Q. Without that exciting cause it might be a long while before it would develop to an acute condition? A. Yes.

Q. Just the same as a man might have heart disease and work at hard labor for a good many years and not suffer inconvenience from it, and then by means of a sudden fall he would accelerate that heart condition. That would be a good comparison, would it? A. Yes.

Q. (by Mr. TRACY). Could this condition be caused from a fall if a person struck on the shoulder and wrenched the back, without external violence to the kidneys? A. I shouldn't think so.

Q. (by Mr. CRONIN). There would have to be external violence directly over the kidneys? A. Yes.

Dr. Andrew J. McGraw testified that he had treated the petitioner since Oct. 23, 1913, and that he found him suffering from chronic nephritis with failing eyesight, and that this failing eyesight progressed so that shortly after Thanksgiving he became totally blind and is now totally blind. His kidney affection has progressed, which has a depressing effect upon him and his heart, and is totally incurable, so that there can be no improvement in his condition, either as to his sight or as to his kidneys, and he is totally unable to work. In his opinion the sole and only cause for this condition is the accident which he had Dec. 16, 1912, and that there is no cause other than that.

Dr. Charles A. Atwood was called by the insurer, and he testified that he treated him for ten days subsequent to the accident; that he was sore from his shoulder to his heels, and complained particularly as to his back. He made no examination as to his urine and had not seen him since.

The arbitrators find that Andrew Cooper suffered from an injury by being injured by a fall on Dec. 16, 1912, and also received a severe electric shock at the same time, and that as a result of the same his kidneys have been affected, causing chronic nephritis to arise, and also causing blindness to follow; and further find that this was the sole cause of his condition. The evidence clearly showed that the petitioner was a young man thirty-three years of age, of the best of habits, living a

clean life and engaged in hard labor, in no way afflicted before the accident, but, on the contrary, being unusually sound and clear, never having had occasion to call a physician before. At the time he had no bother with his kidneys, his urine or from his eyesight, but after the accident these conditions developed. His wife testified as to the blood in his urine, corroborated as it is by Dr. Murphy and by Cooper himself, and we find that this condition resulted from the blow and shock received at the time of the fall. The preponderance of the testimony, and, in fact, all affirmative testimony produced by the physicians, shows that the petitioner is suffering from chronic nephritis, and we believe that the evidence of Dr. Hubbard, a disinterested physician, sent by the Industrial Accident Board, proves that this condition of nephritis from which the petitioner is suffering was caused solely by this accident, and that his blindness is also caused thereby. This testimony corroborates and strengthens the testimony of the other physicians who have testified, and there is no positive evidence to contradict this.

The introduction of extracts from Osler allowed in the testimony, as stated by Dr. Hubbard in his examination, does not fit in this case, as the conditions set forth in Osler as to arteriosclerosis, overeating, overdrinking, gout and leading a strenuous life do not appear in evidence in this case. On the contrary, the opposite condition of life is set forth by the testimony as to the mode of life of the petitioner, and we find that the condition herein set forth as above stated was caused solely by the petitioner in the course of his employment by the accident Dec. 16, 1912, and we find that he has used good faith and made every effort to overcome the disability, as shown by the fact that he endeavored to work from April to October, but was again compelled to give up work.

It was agreed at the hearing that between \$260 and \$275 had been paid to the petitioner as compensation, and we find that he is entitled to the benefits for total disability of one-half his regular wage, \$15.90, or \$7.95 a week, for a period of three hundred weeks, a total of \$2,385, from which is to be deducted \$275 already paid. We find, therefore, that he is

entitled to payments of \$7.95 each week until the sum of \$2,110 is paid.

This decision and all findings regarding compensation or the existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III., of the Workmen's Compensation Act, and the general provisions of said act and its amendments.

DUDLEY M. HOLMAN.

JOHN B. TRACY.

John C. Jones, Jr., dissents.

CASE No. 686.

WILLIAM H. GREGG, *Employee*.

ASHWORTH BROTHERS, *Employer*.

FRANKFORT GENERAL INSURANCE COMPANY, *Insurer*.

TRAUMATIC PERITONITIS A PERSONAL INJURY ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

The evidence showed that the personal injury received by the employee caused the dislocation of the cecum, general adhesions in the abdomen, and constipation, resulting in traumatic peritonitis. This condition necessitated the performance of an operation for the removal of the appendix.

Held, that the employee was entitled to compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of William H. Gregg v. Frankfort General Insurance Company, this being case No. 686 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Joseph A. Parks, chairman, representing the Industrial Accident Board, Edgar N. Ripley, representing the employee, and James H. Kenyon, Jr., representing the insurer, heard the parties and their witnesses in the Committee Room, City Hall, Fall River, Mass., Friday, Feb. 7, 1914, at 10.45 A.M.

H. R. Bygrave, Esq., representing the insurer, stated that the employee was injured on Aug. 27, 1912, and on July 6, 1913, slightly less than a year afterwards, he was operated on for appendicitis, and was disabled for several weeks. No compensation had been paid him, the insurer claiming that there was no connection between the injury and the incapacity which followed the operation for appendicitis.

The employee claimed compensation from July 6, 1913, the date upon which he first lost wages on account of the injury, to Sept. 8, 1913, during which time he was incapacitated for work by reason of an operation for appendicitis, caused by the injury received by him on Aug. 27, 1912. His average weekly wages were \$13.05.

William H. Gregg, the employee, testified that he received a personal injury arising out of and in the course of his employment on Aug. 27, 1912, while working on the shafting in the machine shop. The engine was started without warning, and he was thrown over the shafting, striking the watchman's box as he went over, afterwards going down onto the reels on his side. He worked part of that afternoon, having pains in stomach and side. Later, he went home and did not return for several days, returning only when the foreman requested him to resume his work. After he returned, he was given light work for several days. He did not feel well for an entire year, but did not lose any wages until July 6, 1913. After the operation for appendicitis was performed he returned to work, on Sept. 8, 1913. He does not feel perfectly well at the present time. He stated that he had never had any trouble before the accident, either to his stomach or bowels, and had never been troubled with constipation until after the injury. Constipation came on about a week after the accident, and he took licorice powders constantly for about five weeks, finally going to Dr. Learned, his family physician. The doctor informed him that he was constipated, and gave him instructions and a prescription, and while he only saw the doctor two or three times during the year, he continued to take salts, licorice powders, castorets and castor oil, taking one remedy or another every night. The pains in right side and stomach continued and he finally arranged for the operation.

Harold Holiday, a fellow employee, corroborated the story told by Gregg of the accident, stating that the said employee was on the shaft when the engine started up, and it looked to him as if he went down with the pulley and dropped to the floor, striking the reels on the shaft.

Dr. William T. Learned testified that he knew the employee, Gregg, for five years, and had never attended him for any illness until after the accident, when he treated him for constipation and discomfort in the abdomen. He also advised the employee as to the necessity for an operation for appendicitis, and turned him over to Dr. Milne B. Swift for the operation. The doctor stated that, in his opinion, there was a direct relation between the personal injury of Aug. 27, 1912, and the constipation and subsequent operation for appendicitis. Constipation was a very active factor in causing appendicitis.

Q. Dr. Learned, supposing you found case on opening a man's belly, giving history of previous accident in which man had been whirled down shaft and then had been thrown so abdomen struck wire reel, and then within a week he became constipated with pains off and on in abdomen, and ten months afterwards he had an acute attack of appendicitis, and on operation found that his cecum, which is the end to which the appendix was situated, had been dislocated up under the liver, general adhesions all through the abdomen, and that the man had been tremendously constipated before the operation, — whether or not you would think that accident had nothing to do whatsoever with this, or was a strong causative factor in case of appendicitis? A. Yes, I should think it would be. I should say emphatically it was cause of appendicitis.

Appendicitis is infection of the appendix, and a mere strain, unless brought by infection, would not cause appendicitis. The appendix is a small continuation of large intestine, about three or four inches long, similar in structure to the bowel. Constipation is a result of appendicitis because inflammation sets in and upsets nervous balance of intestines, and it is upset by irritation and pain. A severe wrench would cause constipation.

Q. Assume man receives a blow or wrench of some kind and is disabled for two days and then for a year keeps on working at regular work, — would you say that that man received a wrench or blow severe enough to cause constipation? A. I require further information.

Q. What further information? A. Whether he was as well after the blow as before.

Q. Assume that he was as well after the blow, except that he complained of constipation. A. Blow might have caused constipation. Chances nine to one that it did.

Q. Supposing that he had constipation before the blow or wrench?

A. I should say blow did not cause constipation if he had it before.

Q. Assume that this man was not constipated before and had this blow; was laid up for a couple of days and went back to work; loafed at work two or three days, and then did work as near right as he could do, feeling all the time he was not doing full work, and complaining off and on of cramps and pains in abdomen; that he had been previously normal before the blow, — whether or not blow would have anything to do with constipation and pain in abdomen? A. Yes, it would. Direct relation between cause and effect. As sure as anything can be.

Dr. Milne B. Swift testified that the employee, Gregg, came to the Union Hospital on Aug. 27, 1912, at which time he was chief of the Out-patient Department. At the present time the doctor is the head surgeon in the house. The employee was seen by the interne, who recommended that he remain several days for observation. He decided to return home, however, and came back in three days, at which time the surgeon saw him. Thinking it merely question of a severe strain, he ordered the patient strapped across abdomen and back, the object being to keep the abdominal muscles still. Nothing further was heard of the case until July 6, 1913, when Dr. Learned requested the surgeon to go and see him. He had appendicitis and had been sick several days, and it had been impossible to get a movement of the bowels for a long time without the use of strong cathartics. The doctor then continued: —

I went up and saw the man. It was appendicitis, and I thought at that time that he had not only appendicitis but had general peritonitis. I said the man would die if he did not go to the hospital and might die if he did. Took him to the hospital and opened abdomen in the place where we usually open for appendicitis. I found there large intestine, which is part of intestine to which appendix is attached, but could not find appendix. I then found that I did not have hold of loop of large intestine to which appendix is attached. I had to enlarge the incision about four or five inches. I found appendix up in the kidney fossa with part of the appendix up against the liver, and attached to it, and many of the other intestines bound down by adhesions of long-time standing. I had to explore around to find appendix, and found it attached and lying over the liver. After working around awhile I managed to loosen up the base of appendix and get it out of position in which it was lying. Drew a ligature around it, tied it and cut it out, putting in drain, and

some sutures in the smaller wall. He was given a saline solution and kept on it for three days. This man's intestines were bound down by adhesions so that it was necessary to tear many of them apart, and in this way allow pus and gangrenous portions to come in contact with fresh surface of intestines, and in that way spread peritonitis. He hung between life and death for about ten days. He was in the hospital thirty-five days, and in that time had 45 doses of physics, most of them as powerful as we know. After he was able to talk and I was dressing his wound he asked me whether this case came under the Workmen's Compensation Act. I told him then that there were circumstances which might make it so. I claim regarding his physical condition, and that is only claim I have this man was thrown from shafting, landing on reel, belly downward; that that dislocated upwards part of bowel to which the appendix is attached; that there was some hemorrhage and some inflammation caused by blow which matted intestines down in places where they ought not to be; kinks and bends over the intestines, which brought on severe constipation; and that constipation did cause appendicitis, all leading back to original injury. He gave me history when I went there first time that he had been perfectly well up to about a year ago, when he began to be constipated. A very short history was taken, as I was too anxious to get him to hospital and get appendix out of him.

Q. Assume we have a case where you find adhesions and you remove appendix, having no particular history, would you not place cause of appendicitis to adhesions? A. If I operated, without a history from the patient, and found adhesions there, I would say that the adhesions were due to the appendicitis and not the appendicitis to the adhesions, and therefore that he had had appendicitis for a very considerable time, if the adhesions were old adhesions. The adhesions I found were due to trauma and nothing else. This man had traumatic peritonitis. It is serious when it forms adhesions, and if it does not form adhesions it is not serious.

Q. Assume that you opened man up and found precisely conditions that you find here, — that you found traumatic peritonitis, old adhesions similar to what you found, now might he not have had it one or two years back? A. Before I decide that I would have to ask when you met with injury.

Q. Suppose you met with injury two years before. A. Yes, that would be cause. Traumatic peritonitis is caused by a blow anywhere in the abdomen.

Q. Does it make any difference, if he was wrenched or strained, whether it was on one side or the other? A. If man had strains severe enough to rupture intestines, then I would say that strain caused traumatic peritonitis.

The evidence shows that the personal injury received by the employee caused the dislocation of the cecum, general adhe-

sions in the abdomen, and constipation, resulting in traumatic peritonitis, which necessitated the performance of the operation for the removal of the appendix.

The committee of arbitration therefore finds that the said employee was totally incapacitated for work for a period of nine and one-seventh weeks, from July 6, 1913, to Sept. 8, 1913, by reason of said personal injury, and that he is entitled to the payment of \$59.66 on account of said total incapacity, this being the sum of \$6.525 a week for the period of his total incapacity.

This decision and all findings regarding compensation or the existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III., of the Workmen's Compensation Act, and the general provisions of said act and its amendments.

JOSEPH A. PARKS.

EDGAR N. RIPLEY.

JAMES H. KENYON, Jr.

CASE No. 687.

WILLIAM NOVAK, *Employee*.

CHAMPION INTERNATIONAL COMPANY, *Employer*.

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, *Insurer*.

EMPLOYEE WHO RETURNS TO WORK AND IS UNABLE TO PERFORM WORK GIVEN HIM ENTITLED TO COMPENSATION FOR TOTAL INCAPACITY BECAUSE OF INABILITY TO OBTAIN ANY WORK WHICH HE CAN PERFORM.

The employee, a carpenter, received a personal injury by reason of the taking off of the tip of the thumb of his right hand by a planer knife. Later he obtained employment wheeling coal, but, finding that he was unable to continue at this work because of further trouble with the injured thumb, asked for lighter work. He was discharged and was unable to obtain other work. It appeared in evidence that a simple operation would restore him to full usefulness within a definite period of time.

Held, that the employee was entitled to compensation on account of total incapacity for work. The committee recommended that the insurer furnish an operation. Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of William Novak v. American Mutual Liability Insurance Company, this being case No. 687 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Dudley M. Holman, representing the Industrial Accident Board, chairman, Byron E. Crowell, Esq., representing the employee, and F. J. Chandler, Esq., representing the insurer, heard the parties and their witnesses in a hearing room of the Court House, Lawrence, Mass., on Tuesday, Feb. 17, 1914, at 12 m.

William Novak, a carpenter in the repair department of the Champion International Company at 38 Prospect Street, Lawrence, who are manufacturers of book, pulp and coated paper at Lawrence, Mass., met with an injury on Saturday, Nov. 15, 1913, at 8 A.M. He was planing a piece of board about 4 feet long when the thumb of his right hand struck the planer knife, and the tip end of the thumb was cut off. He was sent to the Lawrence General Hospital for treatment, and there a part of the thumb was amputated. Novak resumed work on November 20, and he was under full pay from November 20 to December 27. He was treated in the Out-patient Department of the hospital from November 15 to December 24. On December 27 he was laid off because there was no work for him, and he endeavored to get work in several other mills, but when the employers saw his finger they would say, "I don't want you." The inner side of the thumb hurts him. On February 9 he went to work for the Merrimack Paper Company at \$9.90 a week. His wages when he was injured, while in the employ of the Champion International Company, were \$12 a week. He was discharged on February 17 because he told them he could not do the work, and asked for something that would be less troublesome to his finger. His work at his last place was wheeling coal. It appeared in evidence that the thumb pained him at night and that on cold days it pained him. He is learning to use his left hand.

Dr. Joseph F. Howard, a physician practicing in Lawrence for fourteen years, and a graduate of Harvard Medical School, said: —

I saw this man some time last week. He came to my office. I examined his thumb and I found that there was an insufficient flap of the thumb. When the finger was operated on there should have been a larger flap left. The trouble comes from this projection of bone. This bone is very superficial, very near the surface, and it seems to be split in the center, and all his trouble comes from that insufficient flap. The effect of that is constant pressure on the nerves. It causes pain; I mean movement of the thumb or pressure on the thumb. Any movement of the thumb will cause pain. Anything cold would affect it. That condition could be remedied — that whole bone should have been taken out at the time to the whole last phalanx, if not, just a small amount left, enough to give a large flap. That condition may improve in time without an operation. The bone feels as though it presses on the flesh. There seems to be a sharp edge there. If it had been cut clean through and a large flap left he would be all right. The covering of the bone on the inside of the tip of the finger is too thin.

The doctor was asked: —

Q. In your opinion, Doctor, can you say whether or not this condition of the inner side of the thumb would be improved without an operation, — can you say positively? A. Well, I imagine if he did not do laborious work and took good care of it, it might get along all right. If he should go bumping it, it's only a question of time when that skin will break.

This is not a case where a nerve has got caught in the scar tissue. If he should be operated on he would be all right in a couple of weeks.

Q. How long would it be before he could do hard work? A. A month would be ample time, I should think.

Q. And it might be a good many months if he does not have something done to it? A. Yes.

The chairman then asked the following questions: —

Q. Would you go to the hospital and have that thumb fixed? A. I would like to have it fixed if the doctor says I will be better after I get operated on.

We find, therefore, that William Novak was injured on Nov. 15, 1913, while in the employ of the Champion International Company, and that his injury arose out of and in the course of his employment; that he is entitled to compensation for

total incapacity from December 27 to February 9, and to partial incapacity from February 9 until February 17, when he was obliged to quit work because of trouble with his thumb; that this partial incapacity is to be one-half the difference between \$9.90, which he received while working for the Merrimack Paper Company, from February 9 to February 17, inclusive, and the \$12 which he received at the time of his injury while employed by the Champion International Company; that he is entitled to compensation for total incapacity from February 17 to some time indefinitely in the future; and that this incapacity, on the medical testimony given, will cease, if he has a proper operation performed upon the thumb, a month after the operation is performed.

While the arbitration committee has no power to order the insurance company to pay for the operation, it is the belief of the committee that as he went to the physician furnished by them and was not successfully treated, in fairness to the employee they should pay the cost of the operation, if there be any cost attached to it. This, however, is no part of the finding and is simply a suggestion as to what seems fair to the committee.

This decision and all findings regarding compensation or the existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III., of the Workmen's Compensation Act and the general provisions of the said act and its amendments.

DUDLEY M. HOLMAN.

BYRON E. CROWELL.

F. J. Chandler dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties in the Hearing Room, New Albion Building, Boston, Mass., Thursday, April 2, 1914, at 3.15 P.M., and affirms and adopts the findings of the committee of arbitration.

The Board finds that, by reason of inadequate surgical treatment by a physician furnished by the insurer, the employee was left with a thumb that had an insufficient flap and a bone projection very near the surface of the skin covering, which causes a constant pressure on the nerve of the member. The evidence shows that any movement of the thumb causes pain and that anything cold will affect it.

In view of the inadequacy of the medical attendance furnished by the insurer, the Board recommends that an operation be furnished by said insurer to relieve this condition, the evidence showing that such an operation will probably restore the employee to normal working efficiency within a month after its performance.

The Board further finds that there is due, in accordance with the report and findings of the committee of arbitration, on account of total incapacity for work, a weekly payment of \$6 from Dec. 27, 1913, to Feb. 9, 1914, a period of six and two-sevenths weeks, that is, \$37.71; a weekly payment of \$1.50 on account of partial incapacity, based upon half the difference between \$12 and \$9 from Feb. 9, 1914, to Feb. 17, 1914, inclusive, one and two-sevenths weeks, or \$1.93, — a total due to said Feb. 17, 1914, of \$39.64; and a weekly payment of \$6, dating from Feb. 17, 1914, at which time the employee again became totally incapacitated for work by reason of his injury, said weekly payment to be continued during said total incapacity for work, the duration of which cannot now be determined.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 689.

GERTRUDE LYNCH, WIDOW OF MICHAEL J. LYNCH (DECEASED), *Employee*.

CASPER RANGER CONSTRUCTION COMPANY, *Employer*.

TRAVELERS INSURANCE COMPANY, *Insurer*.

NO CAUSAL CONNECTION BETWEEN DEATH OF EMPLOYEE FROM ACUTE DILATATION OF HEART IN SEPTEMBER AND INJURY RECEIVED IN MAY.

The employee received a personal injury early in May, by reason of which he complained of pain in his side. Relief was afforded by strapping, and the employee reported for work. Later, in September, he died from acute dilatation of the heart, due to uremic poisoning, having no causal relation with the injury.

Held, that the widow was not entitled to compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Mrs. Gertrude Lynch v. Travelers Insurance Company, this being case No. 689 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of James B. Carroll, chairman, representing the Industrial Accident Board, Frank J. O'Neil, Esq., representing the insurer, and Daniel W. Kenney, representing the employee, heard the parties and their witnesses in the Aldermanic Chamber, City Hall, Holyoke, Mass., on Tuesday, Feb. 24, 1914, at 1.30 P.M.

Mr. Maegher appeared as counsel for the insurance company.

The only question in this case was whether or not the cause of the employee's death arose out of and in the course of his employment; that is, the only question is whether the injury which he received on the fifth day of May, or the disease of nephritis, caused his death.

Dr. George L. Taylor testified substantially as follows:—

I have been a practicing physician in Holyoke for twenty-eight years. The only time I ever met Mr. Lynch was on the ninth day of February, 1913, when I went to examine him for life insurance in the Prudential Insurance Company. He passed the examination at that time, but I have

no knowledge as to whether or not he took out a policy. At the time of the examination I did not notice any Bright's disease, uremia or nephritis. If, on the twenty-first day of September, 1913, he had chronic nephritis or uremia, it would not necessarily be in existence the February previous. I found upon examination that there was no albumin in the urine, and as far as I can remember the man was in good condition. I have no records on this case, however, as we do not usually keep them. In the medical profession it is a well-recognized fact that the excessive use of liquor is often the cause of chronic Bright's disease or chronic diabetes. I never saw Mr. Lynch after the ninth day of February.

Mrs. Stone testified as follows: —

I live in Holyoke and am a sister of Michael J. Lynch. He came to my house three or four times after his injury, and I asked him what was the matter, and he said he never was any good since the accident and never would be. I met him two weeks before he died and I said, "Don't you feel any better now?" and he said "No, and I never will. I guess that fall put me on the bum." I asked every time I saw him why he didn't go to the doctor, and I think the main reason why he did not was because he didn't have the money to pay him.

Mr. Patrick H. Shea of Holyoke testified substantially as follows: —

I have known Mr. Lynch for the past ten years. I was coming down the street the night before he died, about 5 o'clock, when I saw him lying on the sidewalk. He called me over and asked me if I would do him a favor. He said, "Bring me to the hospital. I am dying." I took him to the House of Providence, but I did not see him after that. A man by the name of James Maloney assisted me in taking Mr. Lynch to the hospital. When I found Mr. Lynch he was perfectly sober. I knew him so well that I could tell pretty near when he had been drinking.

Dr. P. E. Hurley testified as follows: —

I saw Mr. Lynch in my office on May the 5th, in the evening. He was complaining of a pain in his side and having trouble on breathing. I strapped him, as is the usual method of taking care of these things. When I put these straps on he felt relieved. A short while after I strapped him he called me up and asked what to do with the straps. I told him to come over to my office, but he said he couldn't, as he was doing something. I then told him to pull them off himself if he could not come to my office. After this telephone conversation I never heard from him again in regard to trouble with his rib. On the 7th of May he came in

again, and when I asked him how he was feeling, he said, "Pretty good." This was the last time I saw him until about the middle of August. Mr. Lynch had just gotten home from Greenfield, and he had some kind of an eruption on his hands. I gave him some medicine for this, and a few days later I was talking over the phone with him and he said that he was all right again. The next time I saw him was at the hospital on the evening before he died. He died early in the morning, about 5 o'clock. I found that he was suffering from uremic poisoning due to the chronic Bright's disease and chronic nephritis, and I ordered some hot packs for him. I saw him again about 2 o'clock in the morning, and he was then dying from acute dilatation of the heart due to the uremic poisoning. I did not make any association at all between the injury Mr. Lynch received in May and the condition of the kidneys which produced death in September. The eruption which appeared on his hand was due to a cement poisoning which he received while on the job at Greenfield. I told Mrs. Lynch that the cause of her husband's death was kidney trouble. There are a number of causes of Bright's disease, exposure to cold and the excessive use of intoxicating liquor being two of them. I knew that Mr. Lynch drank to some extent. He had a fractured rib, and that sometimes incapacitates a man for a month or two, and of course drinking would not help his condition any.

Mrs. Lynch testified as follows: —

When I would ask my husband why he did not work, he would say that his side bothered him where he fell and he was not able to work. Every night before he went to bed I rubbed him with some kind of liniment. His left side was a dark color and turned a sort of a greenish shade. I continued rubbing him every night until he went away to Greenfield to work. He was there only a week when he came back, and he said that he could not stay any longer because his side bothered him all the time. He did not tell me that he was discharged in Greenfield. To my knowledge up to the time of the injury he had always been in good health. He used to drink, but he never neglected his work with it. We have been married nineteen years and have three children.

It was agreed that Mrs. Gertrude Lynch is entitled to compensation from the fifteenth day after the injury to her husband, up to the time he went to work in Greenfield; that is, from the 19th of May to the 20th of August, at \$10 per week, making the amount due, \$132.86.

The committee finds that there was no connection between the death of the employee and the injury received, and that

because his death was entirely due to a disease independent of the injury which he received in May, the widow is not entitled to any compensation for his death.

JAMES B. CARROLL.
FRANK J. O'NEIL.
DANIEL W. KENNEY.

CASE No. 690.

ANDREW MORRISON, *Employee*.

RENDLE & STODDARD, *Employer*.

FIDELITY AND CASUALTY COMPANY OF NEW YORK, *Insurer*.

EMPLOYEE TOTALLY INCAPACITATED FOR WORK BY REASON OF
TOTAL LOSS OF VISION IN LEFT EYE. LOSS OF VISION IN
RIGHT EYE DUE TO CATARACT.

The employee, a pile driver, received a personal injury which destroyed the vision in his left eye. The vision in the right eye had been destroyed previously by reason of a cataract. He was totally incapacitated for work because of the injury.

Held, that the employee was entitled to compensation on account of total incapacity.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Andrew Morrison v. Fidelity and Casualty Company of New York, this being case No. 690 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Edward F. McSweeney of the Industrial Accident Board, chairman, W. Lloyd Allen, Esq., Congress Street, Boston, Mass., representing the insurer, and Charles Morrison, Esq., 16 Pope Street, East Boston, representing the employee, heard the parties and their witnesses at the Hearing Room of the Industrial Accident Board, New Albion Building, Boston, Mass., Monday, Feb. 9, 1914, at 10 A.M.

On Aug. 14, 1913, Morrison, who was employed by Rendle & Stoddard, insured with the Fidelity and Casualty Company, as a pile driver, at an average weekly wage of \$14, was engaged at his regular occupation, working at the corner of Huntington Avenue and Ruggles Street. He was told, with other fellow workmen, to help carry a pile which measured about 12 inches at the butt and 6 inches at the point, and 25 to 30 feet long, from a given point to a place where it could be handled by the pile-driving machine. Morrison was the tallest man on this work, and as he went over a small hump in the ground he felt something happen to his eye. He exclaimed, "My God! What has happened to my eye?" and testified that thereupon the eye appeared as if a cloud had shut off the view. Morrison worked along with difficulty until closing time, and then found his way home by street cars, being helped at transfer points along the way. The next morning he went to the Boston Dispensary and from there to the Massachusetts Eye and Ear Infirmary, where various operations were performed on his eyes.

It is agreed that on Aug. 14, 1913, Morrison was suffering from a cataract in the right eye which had caused complete loss of vision in that eye.

All the testimony was in accord that the trouble with Morrison's left eye is a separation of the retina. The eye experts who examined Morrison — Dr. Wm. J. Daly being selected as the impartial examiner by the Industrial Accident Board, and Dr. Henry Hawkins for the insurer — agreed that while there may be many fundamental reasons for the separation of the retina, the most usual exciting cause is a strain, such as heavy lifting, sneezing, coughing, vomiting, as in cases of seasickness, etc. The doctors were in accord, also, that the sight of the right eye is permanently gone by reason of the cataract which has formed thereon, and the prognosis, as regards any recovery of the sight of the left eye, is doubtful. The probability is that the injured employee will be blind while he lives.

In view of all the testimony, the arbitrators find that on August 14, as a result of an injury arising out of and in the course of his employment, Andrew Morrison lost the sight of his left eye, there being no sight in the right eye at the time of this injury. As a result of said injury he is totally disabled,

and is entitled, under section 11, Part II., paragraph (b) of the Workmen's Compensation Act, to fifty weeks' additional compensation at \$7 a week, or a total of \$350; also to the payment, on account of total incapacity for labor, under section 9 of Part II. of the act, while the incapacity for work resulting from the injury is total, of \$7 a week, or one-half his average weekly wage; this period of payment not to be greater than five hundred weeks from the date of injury, or in amount more than \$3,000.

EDW. F. MCSWEENEY.

CHARLES MORRISON.

W. LLOYD ALLEN.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties on Thursday, March 5, 1914, at 2.45 P.M., and affirms and adopts the findings of the committee of arbitration.

The Board finds that the employee is now totally incapacitated for work as a result of the personal injury received by him on Aug. 14, 1913, said personal injury arising out of and in the course of his employment, the period of said total incapacity being indeterminable.

By reason of said injury the vision in the left eye was destroyed, and as the said employee had no sight in the right eye at the time of the injury he is now totally blind. The employee is therefore entitled to the payment of fifty weeks' additional compensation, at \$7 a week, dating from Aug. 14, 1913, a total of \$350, and to the payment, on account of total incapacity for work, of \$7 weekly, dating from Aug. 28, 1913, the fifteenth day after the injury, and continuing during the period of said total incapacity for work, but not more than five hundred weeks from the date of the injury nor in amount more than \$3,000.

DUDLEY M. HOLMAN.

DAVID T. DICKINSON.

EDW. F. MCSWEENEY.

JOSEPH A. PARKS.

CASE No. 699.

TRESSA SILVA, MOTHER AND DEPENDENT OF FRANK SILVA
(DECEASED), *Employee*.

WHITMAN & PRATT RENDERING COMPANY, *Employer*.

TRAVELERS INSURANCE COMPANY, *Insurer*.

DEPENDENT ENTITLED TO COMPENSATION ON ACCOUNT OF
DEATH OF EMPLOYEE FROM GENERAL SEPTICÆMIA CAUSED
BY INJURY. COMMITTEE'S INVESTIGATION DETERMINES
CASE.

The claimant, the mother of the employee, did not present any evidence which would show that the general septicæmia from which he died had any causal relation with a personal injury arising out of and in the course of his employment. An investigation made by the committee showed, however, that this condition was due to the injury.

Held, that the mother was entitled to compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Frank Silva v. Travelers Insurance Company, this being case No. 699 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Edward F. McSweeney of the Industrial Accident Board, chairman, J. Joseph O'Connor, Esq., of Central Block, Lowell, Mass., representing the insurer, and Edwin R. Sparrow, Esq., Barristers' Hall, Boston, Mass., representing the employee, heard the parties and their witnesses at the Aldermanic Chamber of the Lowell City Hall, Friday, March 6, 1914, at 10.30 A.M.

L. C. Doyle, Esq., represented the insurer.

Arthur L. Woodman, Esq., represented mother of deceased.

Frank Silva, the deceased employee, while employed as a driver for the Whitman & Pratt Rendering Company of Lowell, Mass., on Oct. 25, 1913, was thrown off the wagon which he was driving when the horses became frightened at an electric car and ran away. At first it was thought he had sustained only a severe shaking up, and that the injury was not serious;

he consulted a doctor, who ordered him to bed, and later he was sent to the hospital. General septicæmia developed, from which he died on Nov. 18, 1913. Tressa Silva, mother of the deceased, testified that he had contributed, on an average, from \$4.30 to \$5 weekly to her.

There was no evidence at the arbitration hearing that the death was the result of the injury, but subsequently the arbitrators had a special investigation made, and find, from the report of Dr. J. V. Meigs, medical examiner for Middlesex County, that the septicæmia which was the cause of Frank Silva's death was directly traceable to the injury.

The question at issue is regarding the matter of dependency. The arbitrators find that Tressa Silva, mother of the deceased, was, in fact, partially dependent upon the earnings of the deceased Frank Silva at the time of his death. Investigation by the arbitrators shows that his average weekly wage in this employment was \$8.81 a week, and that his average contributions to his mother equaled about one-half his average weekly earnings, or approximately \$4.40 a week. The arbitrators find, therefore, that Tressa Silva was partially dependent, under paragraph (c), section 7, Part II. of the act, and is therefore entitled to partial dependency payments of \$2.20 a week for a period of three hundred weeks from the date of the injury.

EDW. F. MCSWEENEY.
J. JOSEPH O'CONNOR.
EDWIN R. SPARROW.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room of the Industrial Accident Board, New Albion Building, Boston, Mass., on Thursday, April 9, 1914, at 10 A.M., and affirms and adopts the findings and decision of the committee of arbitration.

The facts are fully stated in the report of the said committee, the parties having agreed to await the decision of the Supreme Judicial Court in the case of *Murphy v. American Mutual Liability Insurance Company*, in which the point as to whether a deduction should be made on account of the cost of the board of the employee was involved.

The Supreme Judicial Court having affirmed the findings and decision of the Industrial Accident Board in the Murphy case, the said Board finds and decides that there is due the partial dependent, Tressa Silva, the sum of \$2.20 weekly from the insurer, the Travelers Insurance Company, said weekly payment to be continued for a period of three hundred weeks from the date of the injury, Oct. 25, 1913.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 715.

HANNAH T. SCHUMAN, WIDOW OF FRED C. SCHUMAN (DECEASED), *Employee*.

THOMAS A. ELSTON COMPANY, *Employer*.

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., *Insurer*.

AN AGREEMENT TO FURNISH FINANCIAL AID TO A CONTRACTOR
AND THE PAYMENT BY THE LATTER OF MONEY LOANED
AND A SHARE OF PROFITS DOES NOT CHANGE THE EM-
PLOYMENT STATUS OF A WORKMAN.

The subscriber, Elston, needing financial assistance, entered into an agreement with one Angell, by the terms of which the latter made a cash deposit of \$3,500 to assist the former to secure a certain contract, and also agreed to furnish another sum to enable the said Elston to fulfill said contract. When the contract was completed, Angell was to be reimbursed and given a share of the profits. All the employees were hired by Elston. The employee, Schuman, received a personal injury arising out of and in the course of his employment, and the insurer of Elston denied liability.

Held, that Schuman was an employee of Elston and entitled to compensation. Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Hannah T. Schuman,

widow, *v.* Employers' Liability Assurance Corporation, Ltd., this being case No. 715 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of Edward F. McSweeney of the Industrial Accident Board, chairman, Herbert Callahan, Esq., of 43 Tremont Street, Boston, Mass., representing the employee, and Philip A. Hendrick, Esq., of 8 Congress Street, Boston, Mass., representing the insurer, heard the parties and their witnesses at the Hearing Room of the Industrial Accident Board, New Albion Building, Boston, Mass., Saturday, March 21, 1914, at 10 A.M.

Fred C. Schuman, age forty years, living at 512 Sumner Street, East Boston, Mass., was, on Jan. 5, 1914, employed by Thomas A. Elston Company at an average weekly wage of \$16.80. The Elston Company is insured, under the Workmen's Compensation Act, with the Employers' Liability Assurance Corporation, Ltd. On the above date, while on a truss getting out bolts, Schuman was knocked off by a falling truss, causing a broken pelvis, fractured ribs and other internal injuries which resulted in his death at the East Boston Relief Hospital on Jan. 5, 1914.

The testimony shows that Fred C. Schuman's death was due to an injury arising out of and in the course of his occupation, and the arbitrators so find.

The testimony also shows that Mrs. Hannah T. Schuman, who was married to the deceased for fifteen years, and had six children by him, was living with him on Jan. 5, 1914, and under section 7 of Part II. is conclusively presumed to be wholly dependent for support upon the earnings of the deceased employee, and the arbitrators so find.

The question at issue is whether the Employers' Liability Assurance Corporation, Ltd., or the United States Casualty Company, separately, or both of them jointly, are responsible for the payment of compensation, as provided by the Workmen's Compensation Act, in this case.

Thomas A. Elston testified that Schuman was employed by him and had been so employed, off and on, for fifteen years. He, Elston, was insured under the Workmen's Compensation Act by the Employers' Liability Assurance Corporation, Ltd.,

and the deceased employee, Schuman, came under this policy at the time he was injured. Elston's business was tearing down buildings, and the work he was doing at the time of the injury was a State contract for the Port Directors of the city of Boston, tearing down sheds, removing pile wharf and buildings at the Eastern Pier Railroad.

Elston, being in need of financial assistance, on the ninth day of December, 1913, entered into an agreement with one Marks Angell of Boston, whereby Angell furnished financial assistance in the carrying out of said contract, and in return was given an assignment of said contract by the said Elston. By this agreement Angell was to make a cash deposit of \$3,500 to the Port Directors to obtain the contract, and agreed to finance Elston in carrying out this work in the further sum of \$4,500. In consideration of this agreement Elston agreed that Angell should receive and handle all the moneys received from the sale of lumber, etc., but no sale exceeding the amount of \$25 should be made without the consent of both parties, etc. It was further agreed that, during the continuance of said contract, Elston should be allowed a drawing account of \$125 a week, and Angell a drawing account of \$100 a week, both said drawing accounts to be deducted from the respective profits of the parties thereto. At the conclusion of the contract Angell should be repaid the sum of \$3,500 paid as deposit to the Directors of the Port of Boston, and such further sums as he might have advanced for the financing of the contract; and the general profit or loss derived from said contract should be ascertained, and from said profit or loss said Elston should be paid, or pay, two-thirds of said profit or loss, and said Angell should be paid, or pay, one-third of said profit or loss. The contract finally provided for proper books of account to be kept by said parties and to be open to the inspection of either of them at all times, and immediately on the conclusion of the contract the accounting hereinbefore specified should be made.

This agreement was entered into on the 9th of December, 1913, and an assignment of the contract from Elston to the said Marks Angell was filed in the office of the city clerk of Boston on the eleventh day of December, A.D., 1913.

Mr. Elston testified that his employees knew nothing of the

financial arrangement between himself and Marks Angell, and that they supposed that he, Elston, was their employer. He testified that when he received a notice to figure this job, knowing it was a large undertaking and being pressed for funds, he was obliged to find somebody to finance it.

Mr. Marks Angell is the owner of the Roxbury Iron and Metal Company, dealers in junk, and is a man who made investments when he saw a possible profit. Mr. Angell considered favorably, the proposition to finance Elston on this contract when it was presented to him, with the result that the agreement heretofore described was made.

Mr. Elston testified that at the time of the hearing he understood there was something like \$20,000 invested in the contract, the work being all completed except carrying away a few loads of materials. Mr. Elston further testified that the Port Directors had approved the assignment to Angell, but looked to him to perform the work and regarded Angell as his bondsman. Mr. Angell had no personal direction of the employees on this work and came there only to see if the work was going on to his satisfaction, to insure the safeguarding of his investment. Mr. Elston's brother acted as superintendent, and in all particulars, as far as the employees knew, the work went on as if Elston were in supreme control. Mr. Elston further testified that Angell acted only as a financial backer, and there was no connection with this contract and Angell's junk business.

It appears from the testimony that Elston subsequently went into bankruptcy, and did not file with his schedules of assets and liabilities any statement of his contract with the Port Directors.

The Employers' Liability Assurance Corporation, Ltd., hold that Marks Angell and not Thomas A. Elston was, on Jan. 5, 1914, the employer of said Fred C. Schuman, and that Marks Angell, having a policy of Workmen's Compensation Insurance with the United States Casualty Company, this company should be held liable, in whole or in part, for the compensation due under the law to the dependents of Schuman for this injury.

Mr. Alfred W. Hollis, insurance broker, testified he was the agent for Marks Angell, in reference to the insurance under the

Workmen's Compensation Act; that Marks Angell had a policy in the United States Casualty Company which covered his employees in the Roxbury Iron and Metal Company. A copy of this policy was offered in evidence. Statement 8 reads: "No wrecking or demolition of structures will be done except as follows . . .," followed by the words, "No exceptions."

Michael Hardy, a fellow employee of Schuman on Jan. 5, 1914, and who was himself injured in this same accident on this day, testified at the hearing that he was employed by the Thomas Elston Company, and had been working on this job since the work started. He had never heard of Marks Angell. He was present at the time that Schuman was injured, and was taken to the hospital with him, being in the bed next to him.

The question before the arbitrators is whether or not the contract between Elston and Angell transferred, in whole or in part, the liability to pay the compensation to the dependent widow from the Employers' Liability Assurance Corporation, Ltd., to the United States Casualty Company.

The arbitrators find, on a preponderance of the testimony, that the obvious intentions of the parties determine that the agreement between Elston and Angell was a loan between a debtor and a creditor, the interest in the loan being paid by an amount equal to a certain amount of profit, and not a partnership; and that the agreement between Elston and Angell, that Angell should receive a share of the borrower's profit, in addition to statutory rates of interest on the loan, was not intended to, and did not, make them partners or constitute Angell the owner of this contract.

The only interest that Angell had in the success of Elston's enterprise in this case was to get back the money which he had furnished Elston on account of this contract, and to get, for the chance of loss that he took, something more than the usual interest on this loan, viz., the drawing account of \$100 weekly and one-third of the profits, as provided by the contract. (*Estabrook v. Woods*, 192 Mass. 499.)

In connection with the claim that the deceased employee, Schuman, was, in fact, the employee of Angell and not of

Elston, the arbitrators find, on the evidence, that Schuman had been working for Elston for some years, and believed, on Jan. 5, 1914, he was still working for Elston, and Elston also considered Schuman as working for him.

The essential test in a loan or transfer of a servant from one hirer to another is that the servant knows of the loan or transfer and consents thereto, and passes under the direction and control of the new employer. Such consent on the part of the deceased to such transfer of employers is wholly lacking in this case. (*Samuelian v. American Tool and Machine Co.*, 168 Mass. 12; *Driscoll v. Towle*, 181 Mass. 419; *Regan v. Casey*, 160 Mass. 375.)

The relation of Angell to Elston was solely to determine the financial result of the operation, and to control the money received in payment of the contract as it came from the Port Directors. The actual conduct of the work was wholly under the control of Elston and his brother, who superintended the employees on this job, and Elston, and not Angell, was in control of the way of reaching the result.

In this case Schuman, the employee of Elston, for whom he had been working for years, and for whom he was still supposed to be working, could not, without notice from Elston to Schuman, or any knowledge on Schuman's part, be shut off from his rights to the benefits of the workmen's insurance policy in the Employers' Liability Assurance Corporation, Ltd., taken out by Elston for the benefit of his employees, because Elston, due to his financial necessities, had been obliged to get Angell to loan him money to enable him to complete his contract, and later to get Angell to become his bondsman after he had gone into bankruptcy.

The arbitrators find that on Jan. 5, 1914, Fred C. Schuman received an injury arising out of and in the course of his employment as the employee of Thomas A. Elston & Co., from which injury death resulted; and further find that Elston was, on July 5, 1913, insured in the Employers' Liability Assurance Corporation, Ltd.; that Mrs. Hannah T. Schuman, wife of the deceased, is totally dependent, and is entitled to receive from the Employers' Liability Assurance Corporation, Ltd.

one-half the average weekly wage of said deceased, or \$8.40 a week, for a period of three hundred weeks from the date of the injury, as provided by section 6, Part II., of the act.

EDW. F. MCSWEENEY.

HERBERT F. CALLAHAN.

Philip A. Hendrick dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, New Albion Building, Boston, Mass., on Thursday, June 25, 1914, at 11 A.M., and affirms and adopts the findings of the committee of arbitration.

The material evidence is substantially reported by the committee of arbitration, and shows that Fred C. Schuman, the employee, received a personal injury arising out of and in the course of his employment while in the employ of the subscriber, the Thomas A. Elston Company, by reason of which death resulted. Thomas A. Elston, needing financial assistance in order to carry out a certain contract which he had made with the Port Directors of the city of Boston, entered into an agreement with Marks Angell, by the terms of which the latter was to make a cash deposit of \$3,500 to assist the said Elston to secure the contract, and finance the latter in carrying out his work in the further sum of \$4,500. It was also agreed that all moneys should be received by the said Angell, and that Elston should have a drawing account of \$125 weekly and Angell \$100 weekly. When the contract was completed, Angell was to be reimbursed on account of his deposit of \$3,500 and such other sums as were advanced by him; and when the balance of profit or loss was ascertained, Elston and Angell were to share it to the extent of two-thirds and one-third, respectively.

All the employees were hired by Elston, and the arrangement with Angell was made necessary by reason of his financial needs. The financial agreement and assignment were entered into and signed by Elston for the purpose of pro-

protecting Angell, whose only interest in the contract was to receive, in addition to the sums furnished as a deposit and advanced to said Elston, something more than the usual interest on the money advanced, to wit: the drawing account of \$100 weekly, and one-third of the profits, if the contract yielded a profit. There was no intent on the part of either to make the other a partner, the agreement between them making one a debtor and the other a creditor. The essential element necessary to the loan or transfer of a servant from one employer to another was lacking here, no such transfer having been arranged or consented to by the employee, Schuman, or any other employee.

Schuman was, in fact, an employee of Elston's, had been working for him for some years, and was considered by himself and the said Elston as an employee of the latter. The subscriber, Elston, was insured under the Workmen's Compensation Act by the Employers' Liability Assurance Corporation, Ltd., and, as an employee of a subscriber to such insurance, Schuman was covered under the statute.

The Industrial Accident Board finds, upon all the evidence, that Fred C. Schuman, the said employee, was employed by the Thomas A. Elston Company at the time of the injury, said injury arising out of and in the course of his employment; that he received an average weekly wage of \$16.80; that Hannah T. Schuman, his widow, lived with him at the time of his death; and that there is due the said widow from the insurer, the Employers' Liability Assurance Corporation, Ltd., the sum of \$8.40 weekly for a period of three hundred weeks from the date of the injury, Jan. 5, 1914.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
EDW. F. MCSWEENEY.

CASE No. 719.

MARY MURPHY, MOTHER OF DOMINICK MURPHY (DECEASED), *Employee*.

HOLYOKE SUPPLY COMPANY, *Employer*.

ÆTNA LIFE INSURANCE COMPANY, *Insurer*.

COMPENSATION DUE TO A DEPENDENT UNDER STATUTE IS A
VESTED INTEREST AND PASSES TO THE ESTATE AFTER
• DEATH OF SAID DEPENDENT.

The evidence showed that the employee, who received personal injuries which resulted fatally, lived at home and contributed \$12 weekly to the support of his mother. The household, of which the mother was the head, consisted of the said mother, who was a partial invalid; a daughter, who remained at home, performing the work of the household under the direction of her mother and acting as her agent in the management of the same; another son, who paid \$4 or \$5 weekly as board; an adopted daughter, who contributed her weekly wage of \$6; and the employee, Dominick Murphy.

Held, that the mother was wholly dependent upon the employee for support.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration and, the mother having died since the hearing, rules that the compensation due the said dependent is a vested interest and passes to her estate.

Appealed to Supreme Judicial Court.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Mrs. Mary Murphy v. Ætna Life Insurance Company, this being case No. 719 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of James B. Carroll, chairman, of the Industrial Accident Board, Thomas J. Lynch representing the employee, and Henry A. Moran, representing the insurer, heard the parties and their witnesses in the Aldermanic Chamber, City Hall, Holyoke, Mass., Tuesday, Feb. 24, 1914, at 2 P.M.

Thomas J. O'Connor, Esq., appeared as counsel for the employee and Addison L. Green, Esq., for the insurer.

The only question in this case was whether or not the mother was wholly dependent upon the wages of the deceased for her support.

Eva Murphy testified substantially as follows:—

I live with my mother, my brother Barney and my adopted sister Bernadette, at 100 Lyman Street. I stay at home and do the housework and have done so for some years. My mother is about seventy years old. She is an invalid, suffering from diabetes, and is confined to her bed. On December 26, the day my brother Dominick was killed, he was working for the Holyoke Supply Company. At the time of my brother's death my brother Barney was working for the Cudahy Packing Company, and was paying me either \$4 or \$5 a week for board. I did not always get a certain amount from Dominick. It depended upon what I needed. Sometimes he would give me \$10, \$12, \$16 and on one occasion he gave me his whole pay. He generally gave me \$12. Besides giving me this money he bought all the brandy which my mother required and also bought some medicines. With the money that Dominick gave me I paid the expenses of the house, the rent, the grocery bill and the other bills. Barney did not give me his board regularly because he was out of work quite awhile. On Thanksgiving, 1912, he went to the hospital to have an operation performed on his toe, and he was not able to return to work until March, 1913. I also had my sister Bernadette working at the time of my brother's death, but I could not depend upon her. She is in poor health, so is unable to work steadily. She works at Skinner's Silk Mill. When she works a full week she gets \$7. She has been working there about two years. During last December she worked very little on account of the shut down at Skinner's. All the money that Bernadette made she turned over to me, and I bought her clothes out of it. Barney bought his own clothes and Dominick bought his own.

Barney Murphy testified substantially as follows:—

I am forty-five years old and am working at the present time in the Cudahy Packing Company. For the past three years I have lived at home with my brother Dominick, my sister Eva and Bernadette. I have worked quite regularly since I came out of the hospital, with the exception of a couple of days that I was out sick. I earn \$12 a week when I work a full week, and out of this I give my sister \$4 or \$5 for board, but I never pay more than \$5. I never told my brothers that I paid more than \$5 a week. With the \$8 I had over I had to pay my hospital expenses, etc. My brother Dominick could give more money because he made more. I drink a little, but work pretty steadily. I have worked at Cudahy's seven years this June.

John Murphy testified as follows:—

I did not say that Barney gave in \$6 a week. I did not know exactly, but I thought he gave about \$5, from talks that we used to have together when I have been down to the house.

We find that Bernadette, the adopted child, had been working without interruption from August 2 down to the date of the injury, at an average of a little more than \$6 a week.

The committee finds upon the evidence that the mother of Dominick Murphy was not dependent upon either Bernadette or Barney, but was totally dependent upon Dominick for her support, and is therefore entitled to half his average weekly wages, \$9.75, for a period of three hundred weeks from the date of the accident.

JAMES B. CARROLL.

THOMAS J. LYNCH.

Henry A. Moran dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties and their witnesses in the Aldermanic Chamber, City Hall, Holyoke, Mass., on Friday, May 8, 1914, at 2 P.M., and affirms and adopts the findings of the committee of arbitration, and further finds and decides as follows: —

Two questions are raised for determination by the Board in this case: —

1. Was Mrs. Mary Murphy, the mother, wholly or partially dependent for support upon Dominick Murphy, the deceased employee, at the time of his injury?

2. The said mother having died on March 12, 1914, does any compensation found due her cease at death, or is it a vested interest and as such pass to her estate?

The evidence shows that the Murphy household, of which Mrs. Mary Murphy, the mother, was the head, consisted of the said Mary Murphy, who was a partial invalid; Eva Murphy, a daughter, who remained at home, performing the work of the household, under the direction of her mother, and acting as her agent in the management of the same; Barney Murphy, a son, who worked for a packing company and who paid \$4 or \$5 weekly for his board, never more than \$5; Bernadette, an adopted daughter, who contributed \$6, her weekly wage; and Dominick Murphy, who contributed, on the average, \$12 a week for the support of his mother, the weekly contributions

varying from \$10 to \$16, and in addition purchased whatever medicine and brandy his mother needed.

The Board finds, on the evidence before the committee of arbitration, and the additional evidence introduced before the Industrial Accident Board, that the mother received nothing in the way of support from Barney and Bernadette, the weekly sum paid by Barney scarcely covering the cost of his board, and the wages of Bernadette being used to provide board, lodging, car fare and incidentals, so that the said mother was not dependent, in any degree, upon either for support; that the said mother was, in fact, wholly dependent for support upon Dominick Murphy, all of her support being derived from his average weekly contribution of \$12; and there is therefore due the said dependent, Mrs. Mary Murphy, from the insurer, the Ætna Life Insurance Company, a weekly payment of one-half the average weekly wages of \$19.50 earned by the said Dominick Murphy; that is, the payment of \$9.75 weekly for a period of three hundred weeks from Dec. 26, 1913, the date of the injury.

The Board further finds and rules that the compensation due the said dependent is a vested interest and passes to her estate upon her death; and the said dependent having died, no compensation having been paid her by the said insurer, there is due the administrator of her estate the sum of \$9.75 weekly for a period of three hundred weeks from Dec. 26, 1913, the date of the injury, in accordance with the provisions of the act. (*United Collieries v. Hendry* (1909), 2 B. W. C. C. 308; *Darlington v. Roscoe & Sons* (1910), 9 W. C. C. 1.)

The insurer has filed requests for rulings which are annexed hereto. Requests numbered 1, 2, 5, 6, 7, and 8 are refused. No. 3 is given, with the qualification that there must be a dependent at the time of death. No compensation is payable unless a dependent is living at the time of the employee's death. No. 4 is given, with the qualification that the money was paid to Eva Murphy, as agent or custodian, for the mother, Mrs. Mary Murphy, and as so modified is given.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
EDW. F. MCSWEENEY.

Requests of the Insurer for Rulings and Findings.

1. That Mrs. Mary Murphy, the mother of Dominick Murphy, having died March 12, 1914, the obligations of the insurer to pay any part of Dominick's average weekly wages to said Mary ceased at her death.

2. Under chapter 751 of the Acts of 1911, as amended, the obligation of an insurer to pay weekly compensation to dependents ceases when the dependents themselves die.

3. It is not the intention of chapter 751 of the Acts of 1911, as amended, to enforce weekly payments by the insurer when there is no dependent living to require support.

4. The household of which Mrs. Mary Murphy was a member was conducted and managed by a daughter, Eva Murphy, who paid all the bills and did all the housework. The money for conducting the house was all paid to Eva Murphy by her brothers, Dominick and Bernard, and by her adopted sister, Bernadette, and went into a common fund which was used by Eva for the support of the household, of which Mary Murphy was a member. Under such circumstances Mary Murphy cannot be said to have been held dependent upon Dominick Murphy for her support.

5. Under all the circumstances in the case Mrs. Mary Murphy cannot be held to have been wholly dependent upon Dominick Murphy for her support.

6. Upon all the evidence in the case Mrs. Mary Murphy must be held to have been partially dependent upon Bernadette Murphy for her support.

7. Upon all the evidence in the case Mrs. Mary Murphy must be held to have been partially dependent upon Eva Murphy for her support.

8. Upon all the evidence in the case Mrs. Mary Murphy must be held to have been partially dependent upon Bernard Murphy for her support.

CASE No. 725.

SARAH J. TOBIN, WIDOW OF JOHN TOBIN (DECEASED), *Employee*.
 FRED T. LEY & Co., *Employer*.
 ÆTNA LIFE INSURANCE COMPANY, *Insurer*.

PERSONAL INJURY NOT CAUSED BY SERIOUS AND WILLFUL
 MISCONDUCT OF EMPLOYER.

The evidence shows that the employee received a personal injury while at work in the pole yard of the subscriber, his head being crushed and the injury resulting fatally. It was claimed that the pole which caused his death would not have rolled over had it not been for the inability of the said employee's fellow workmen to hold it, because of the inefficient cant hooks supplied and the inexperience of said workmen. The evidence shows, further, that all of the men on the job had been employed for a longer period than was required to become familiar with the work which they were required to do, and had been instructed by the superintendent and foremen as to the proper manner in which to perform this work. The cant hooks were not in good repair, and a supply of new hooks had been ordered by the subscriber.

Held, that the widow was not entitled to double compensation, the personal injury not having been caused by the serious and willful misconduct of the subscriber.

Review before Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Mrs. Sarah J. Tobin, widow, *v.* Ætna Life Insurance Company, this being case No. 725 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Edward F. McSweeney of the Industrial Accident Board, chairman, J. Frank Scannell of 10 Tremont Street, Boston, Mass., representing the insurer, and James H. P. Dyer, Esq., of Leominster, Mass., representing the employee, heard the parties and their witnesses at the Selectmen's Room, Town Hall, South Framingham, Mass., Wednesday, March 18, 1914, at 2 P.M.

John P. Driscoll, Esq., appeared as counsel for the employee, and Richard J. Cotter, Esq., for the insurer.

John Tobin, forty-five years old, employed by Fred T. Ley & Co., insured in the Ætna Life Insurance Company, on

Saturday, Dec. 13, 1913, was working as a ground worker in the pole yard with other employees, taking unfinished electric light poles from one pile, trimming off the bark, smoothing them up and shaving down the ends. The method was to take the poles from the untrimmed pile according to their various lengths, and roll them along the ground on to a track of skids; and while they rested on these skids they were trimmed, and then rolled on to an incline of skids to the finished pile.

The evidence shows that after a pole had been trimmed, three or four of the workmen pushed it up on to the finished pile, and returned to complete another pole, which was on the ground skids. The particular pole upon which they were working at the time of the accident was crooked, bulging in the middle. As this crooked pole lay on the ground, with the bulging ends towards the ground, the upper side was smoothed off by the workmen; with their cant hooks they turned it over to smooth off the other side. When the log was turned over, with the crooked part uppermost, in some way it became overbalanced, making a half turn forward, catching Tobin by the foot, which was crushed beneath the heavy end of the pole, throwing him to the ground, striking his head on another pole which was on the ground, resulting in fracture of the skull, from which he died Jan. 7, 1914.

It appears in evidence that the deceased employee, John Tobin, was married, had a wife, Sarah J., and nine children. His wife, Sarah J., was living with him at the time of his death, and is, under section 7, Part II., of the act, conclusively presumed to be wholly dependent for support upon him, and the arbitrators so find.

The claim is made by the dependent widow that her husband's death was due to the serious and willful misconduct of the subscriber or of some person regularly intrusted with and exercising the powers of superintendence for him, and that therefore the compensation should be doubled, in accordance with section 3, Part II., of the act.

This claim by the dependent widow is based on the assertion that the cant hooks supplied to the workmen were out of order, the handles were broken and otherwise unfit for use, and that the persons employed and working with Tobin were untrained

and unskilled in this work, all of which caused the injury, and constitutes serious and willful misconduct.

Regarding the tools, the arbitrators find, on the preponderance of the evidence, that the cant hooks, the principal tools handled by these men, were not in a good state of repair. Some four or five days prior to the injury the sub-boss or foreman of the yard, James Farmer, had notified Superintendent Peters that the cant hooks were in bad shape, and asked for new ones. Peters thereupon immediately ordered new cant hooks from Boston, and they were delivered within three or four days thereafter.

The evidence of Peters, the superintendent, and two of the workmen, Callahan and Purrington, was to the effect that a part of the new cant hooks had been delivered and put in use at the South Framingham yard on the morning of the injury. Farmer, the foreman, was positive that the new cant hooks had not arrived until the day after the injury. Cummings, Purrington and Callahan testified that their orders from the superintendent, Peters, and the foreman, Farmer, were to be careful and to observe certain measures of precaution, which were prescribed, to save themselves from injury. Purrington testified, and Callahan agreed, that Farmer, the foreman, was careful of his men; that he had warned them in general ways about the use of the cant hooks, and of safety in using them, and from his general actions and supervision these employees believed Farmer wanted them to be careful, and did not intend that they should be injured while he was in authority over them.

Regarding the exact cause of the injury there is a variance of testimony. Purrington testified that Callahan and he were turning over the log just as Tobin passed in front. They let go of the log with their cant hooks, for what reason they could not say.

Farmer, the foreman, testified that he was working on the pile of unfinished logs and did not see just what happened until the log turned over and caught Tobin by the foot, when he jumped to his relief, and was, in fact, first to reach him, and, with the help of Tobin's fellow employees, to release him from the log under which he was caught.

Farmer further testified that Tobin was in front of the pole, and that Callahan, Purrington and Cummings made no attempt to stop it as it went over; that Davis tried to hold it but could not do so; that he had told Superintendent Peters the cant hooks were out of order as soon as he knew they were in such condition, and believed that Superintendent Peters ordered new hooks as soon as he received the information. When cant hooks or other tools were ordered, if they were in stock they were usually sent at once, and delivered where the work is being done. Four days was not an unusual delay in the delivery of the tools after request was made. Farmer's general orders from Superintendent Peters were to be careful.

The following is an extract from the testimony of James Farmer, foreman, taken at the Union Hospital, South Framingham: —

Q. Was there a cant dog on this particular pole? A. The men had them in their hands.

Q. Instead of turning it half over — A. They didn't catch it in time to keep it from going over.

Q. (by Arbitrator DYER). Did they have proper cant hooks? A. No, sir.

Q. If they had, they could have caught the log and it would not have rolled down? A. Yes, sir; I was there at the time of the accident and took the log off his foot, and I knew they didn't have proper cant hooks because I told Peters, the superintendent, two or three days before.

Q. And you did not have proper cant hooks when this accident happened? A. No; these should not have been used.

Q. If there were proper cant hooks attached to this log, would it have rolled over and caught his foot? A. No.

Q. Were the men experienced men? A. I could not call them all experienced.

Regarding Tobin's position in front of the log, Mr. Farmer thought Tobin was evidently intending to go in back with the other men, and was at that moment in a dangerous position, and because of the quick turning over of the log, due to its crooked shape, he was caught.

In this case the arbitrators find that Tobin, while in the employ of Fred T. Ley & Co., received an injury arising out of and in the course of his employment, which resulted in his death. His widow, Sarah J., who was living with him at the

time of the injury, was totally dependent on him, and is entitled, therefore, to the weekly payment from the Ætna Life Insurance Company, from the date of the injury, of one-half the average weekly earnings of the deceased, or \$6, for a period of three hundred weeks.

Regarding the claim for serious and willful misconduct, the arbitrators find that the labor being performed on this job by the deceased, by Purrington, Callahan, Davis and Cummings, was unskilled labor, but the work to be performed was work which could easily be learned in a day or two. The evidence shows, regardless of the disputed claim that new hooks were delivered to this yard the morning of the injury, that the particular cant hooks which were being used were in bad repair. The log on which the men were working, and which caused the injury, was crooked in the center; the men had shaved one-half of this log with the crooked end resting on the ground, and were turning it over to work on the other side, when it became overbalanced, and Tobin, who was directly in front of it, got caught, struck his head, and died as a result.

The arbitrators cannot find anything in the evidence to justify the claim that there was serious and willful misconduct on the part of the employer. All the witnesses agreed that both Peters and Farmer had frequently advised the employees how to do the work in order to protect themselves. As soon as Farmer told Peters about the condition of the cant hooks they were ordered, and were received without unnecessary delay. The facts appear to be that this accident was due to the employees, including the deceased himself, not realizing that this crooked log, when it was turned over with the crooked part uppermost, was likely to become overbalanced and turn quickly, as such crooked logs are likely to turn; and Tobin, either not knowing that the log was crooked, or expecting he would have time to jump out of the way when it started to turn, was in such a position that he could not get out of the way.

The cant hooks were, as a matter of fact, dull; but according to the testimony of the workmen they had let go of the log and did not even attempt to stop it turning over, so that if the hooks had been sharp it would not have made any difference in the result.

On all the testimony, the arbitrators fail to find any evidence to substantiate the claim of serious and willful misconduct in this case, and find that the Ætna Life Insurance Company is not liable for the double compensation, as provided by Part III., section 3 of the Workmen's Compensation Act.

EDW. F. MCSWEENEY.

J. FRANK SCANNELL.

JAMES H. P. DYER.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties in the Hearing Room, New Albion Building, Boston, Mass., on Thursday, May 28, 1914, at 2 P.M., and affirms and adopts the findings and decision of the committee of arbitration.

The dependent widow claimed double compensation, alleging serious and willful misconduct on the part of the subscriber, or of a person exercising superintendence, and this was the only point at issue in the case. It was agreed that the widow, Sarah J. Tobin, lived with the employee at the time of the injury; that the average weekly wages of the said employee were \$12; and that she was entitled to the payment of \$6 weekly for a period of three hundred weeks from the date of the injury, to wit, Dec. 13, 1913.

The evidence shows that the employee, John Tobin, while working for the subscriber in the pole yard at South Framingham on Dec. 13, 1913, was caught by a pole which had become overbalanced, and was thrown to the ground. His head came in contact with another pole, or log, his skull being fractured, and death resulted on Jan. 7, 1914. It was claimed that the pole would not have rolled over had it not been for the inability of Tobin's fellow workmen to hold it, by reason of the inefficient cant hooks supplied and the inexperience of the said workmen. The weight of the evidence shows, however, that while the labor employed by the subscriber was unskilled, the work was such as could have been done by the men after having been employed a day or two, and that it was such work as unskilled laborers could ordinarily perform. All of the men

on the job had been employed for a longer period than was required to become familiar with the work which they were required to do, and had been instructed by the superintendent and foreman as to the proper manner in which to perform this work. While the cant hooks were dull and out of repair, Tobin's fellow workmen made no attempt to use them to prevent the pole, or log, from falling. It was also shown that the pole which became overbalanced was crooked at the center, and that because of the shape of the pole it fell over and struck the employee. The said employee was at that time in a position of danger, in front of the pole, and because of its unexpected turning over received the injury which resulted in his death. The evidence also shows that promptly, upon receiving notification that the cant hooks were out of repair, new ones were ordered by the subscriber.

This evidence does not show that there was serious and willful misconduct on the part of the subscriber, or any person exercising superintendence. The poor condition of the cant hooks did not contribute to the injury, the evidence showing that no attempt was made by the workmen to stop the pole from turning over, and that if the said workmen had had perfect cant hooks the injury would probably have occurred under the conditions existing at that time. The inexperience of the workmen was not a contributing factor, Tobin's fellow workmen being of at least the average intelligence and having ample experience in the performance of the work of the subscriber. The employee's position of danger in front of the pole, and the sudden overbalancing of said pole, caused the injury, and not the serious and willful misconduct of the subscriber, his superintendent or foreman.

The Board finds, upon all the evidence, that the employee did not receive the injury which resulted fatally by reason of the serious and willful misconduct of the subscriber or of a person exercising superintendence, and dismisses the claim for double compensation.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 735.

IDA L. BIRNIE, WIDOW OF JAMES L. BIRNIE (DECEASED), *Employee.*

WILLIAM T. SPARGO, *Employer.*

CONTRACTORS MUTUAL LIABILITY INSURANCE COMPANY, *Insurer.*

CEREBRAL HEMORRHAGE HAVING NO CAUSAL CONNECTION
WITH PERSONAL INJURY CAUSES DEATH OF EMPLOYEE.
REPORT OF IMPARTIAL PHYSICIAN WHO PERFORMS AUTOPSY
A FACTOR IN AIDING COMMITTEE TO REACH ITS DECISION.

The employee, a granite cutter, fell in the cutting shed of the subscriber, and died four days later from cerebral hemorrhage. The evidence given by fellow employees, who were presumably eyewitnesses of the occurrence, was wholly at variance with the weight of the medical testimony. An impartial physician was appointed to perform an autopsy, and his report and evidence showed that the said employee did not in fact receive a personal injury arising out of and in the course of his employment.

Held, that the dependent widow was not entitled to compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Ida L. Birnie, widow of James L. Birnie (deceased), *v.* Contractors Mutual Liability Insurance Company, this being case No. 735 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of Joseph A. Parks, chairman, representing the Industrial Accident Board, Francis J. W. Ford of Boston, Mass., representing the widow, and Alex. Falconer of Quincy, representing the insurer, heard the parties and their witnesses at the times and places stated below.

The first hearing of said committee was held at the Aldermanic Chamber, City Hall, Quincy, Mass., on Tuesday, March 31, 1914, at 10.45 A.M.; the second hearing at the Hearing Room, Industrial Accident Board, on Wednesday, April 15, 1914, at 2.30 P.M.; the third hearing at the same place on Tuesday, May 5, 1914, at 10 A.M.; and the final hearing was held at the same place on Wednesday, June 24, 1914, at 9 A.M.

The question at issue in this case is whether the employee died from cerebral hemorrhage due to natural causes, or the same condition due to a personal injury arising out of and in the course of his employment.

William C. Prout, Esq., attorney for the claimant, Ida L. Birnie, widow of the employee, claimed compensation on the ground that it was due to a personal injury, as provided by the statute; Richard J. Cotter, Esq., attorney for the insurer, denied liability, on the ground that death resulted from natural causes.

Several hearings were held and every opportunity was given to both parties to present all the evidence desired. The evidence as to the injury itself, as given by certain fellow employees, and references to same as given by the widow, who testified concerning her conversation with the employee, was in direct contradiction to the weight of the medical evidence, and the committee finally decided to refer the matter to an impartial examiner for the purpose of having an autopsy held to determine exactly what the cause of the death was. This report is attached hereto and made a part of the report of the committee.

It should be understood that the committee has not attempted to set forth in any detail the testimony submitted, the presentation herewith being merely a statement of the material evidence given by the different witnesses.

James Birnie, the employee, fell in the cutting shed of the subscriber, William T. Spargo, a manufacturer of granite monuments, at about 7.30 o'clock on the morning of Monday, Jan. 26, 1914, and was taken to his home by William J. Spargo and a fellow employee, Jacob Jacobson, where he died four days later.

Jacob Jacobson stated that he saw the employee, Birnie, fall over backwards, and that Birnie told him that he had tripped over a little block before falling. Emil Gibson, another employee, stated that he saw Birnie about 7.30 o'clock, when Jacobson picked him up. A few minutes later the employee resumed work, continuing for about a half hour. The employee then stated that he was sick, and said that he had stubbed his foot on a block, which caught the heel, causing him to fall

and strike his head on another block. He also complained of having a bad bump on the back of his neck, and Gibson felt same and it was about the size of his knuckle. Antonio Giudici, a third employee, stated that Birnie informed him that he had received an injury to the back of his head, and that he rubbed his neck, and then began work again. Twenty minutes later he saw Birnie standing near the stone with his hand behind him, his machine down on the floor and his hose in his hand. Birnie could not shut the power off and Giudici shut it off for him. Mrs. Sedora Sylvester and Mrs. Ida L. Birnie each testified that Birnie informed them that he tripped on a piece of wood, which caught his heel, causing him to fall and strike on the back of his head. Mrs. Sylvester stated that "there was a great big bunch on the back of his head," and that he did not appear to have received a shock; "he knew everything just as bright as could be."

The employee, Birnie, was taken home in an automobile by William J. Spargo, foreman for the subscriber, and nothing was said either by Birnie or Jacobson, a fellow employee, as to a fall, as described by witnesses and as stated by Birnie to his wife and Mrs. Sylvester. Jacobson told Spargo that Birnie had fainted, and stated that he did not have any knowledge as to the cause of the fainting spell.

Dr. George M. Sheehan, the attending physician, stated that he diagnosed the condition of the employee as apoplectic shock and stated that the employee had given him a history of having got dizzy at work, of sitting down and of then falling over backwards. The doctor did not find any fracture of the skull, the only evidence of the injury being bleeding spots on the left arm and hand. There were no bleeding spots on head, or cuts of any kind.

Dr. Francis Raymond Burke, who made an examination of the employee's head before his death, found no sign of any lump on it, nor did he discover any external marks which would indicate that death was due to any but natural causes.

There was evidence to the effect that Birnie, while working for John L. Miller, mayor of Quincy, had many fainting spells, this evidence being given by Mr. Miller, Dr. Fred E. Jones, who attended him on at least one occasion, Albert L. Hayden,

Daniel J. Ford, Henry Graemaker and August Carlson, the latter four being former fellow employees of Birnie when he worked at Miller's. J. W. Stancombe, secretary of a mutual relief association to which the employee belonged, testified that he had paid the latter benefits on a certificate of Dr. J. F. Welch, which gave cerebral congestion as the cause of disability, on a former occasion. Mrs. Emma F. Welch, widow of the doctor referred to, stated that her husband was too ill to attend Birnie at the time of the injury, but she had asked him if the employee had ever had any premonition of shock, or symptoms of such condition before, and he had replied, "No."

Dr. Albert H. Flower stated that he had treated the employee Birnie in October, 1913, for inflammation of the bladder and pain in the stomach, and that his heart and arteries were in good condition. Dr. William J. MacAusland testified to the treatment of the employee for convulsions, probably epilepsy, in December, 1906. Finally, Dr. Francis D. Donoghue, who had read a full transcription of the evidence, stated that it was his opinion, as an expert, that the employee died from apoplexy, with the probability being that there was no causal relation between said condition and any injury arising out of his employment.

The committee then referred the matter to Dr. Timothy Leary, medical examiner for Suffolk County, requesting him to act as the impartial physician, appointed by the Board as provided by Part III., section 8 of the act, and render an opinion as to the cause of death, after having made an autopsy, and the doctor's opinion is attached hereto. Briefly, however, it may be stated the doctor finds that, in his opinion, based upon a complete autopsy, "the fall in this case was a consequence of the cerebral hemorrhage and not a cause."

The committee of arbitration has received assistance of the greatest value from the impartial physician who performed the autopsy. The evidence given by the fellow employees of the deceased, who were presumably eyewitnesses of the injury, was entirely at variance with the weight of the medical testimony. If these witnesses were to be believed, the employee Birnie did in fact receive a personal injury arising out of and

in the course of his employment which had a causal connection with his death. If the medical evidence was to be given due weight, the testimony of these eyewitnesses of the accident was, to say the least, greatly distorted and largely imaginative, since said medical evidence showed that from a pathological standpoint the death of the employee was due solely to natural causes. In this dilemma, with positive statements of facts on the one hand by witnesses of the injury, opposed by positive statements of medical facts by the physician who treated the employee, and others, the committee needed and sought proper medical advice in the person of the impartial physician appointed. In order to secure this assistance it was necessary to obtain the consent of the claimant widow and her counsel to the autopsy, and this was promptly granted, showing the sincerity of the widow and counsel in the prosecution of her claim. The report of the medical examiner left no doubt in the committee's mind as to the cause of the injury, and without impugning the reliability of any of the witnesses who testified, it must find that the employee did not in fact receive a personal injury arising out of and in the course of his employment, and dismiss the claim of the dependent.

The committee of arbitration therefore finds, upon all the evidence, that the employee, James L. Birnie, died in consequence of a cerebral hemorrhage, and that the fall which he sustained on Jan. 26, 1914, did not arise out of and in the course of his employment, but was the after effect of said cerebral hemorrhage. The claim of the widow, the said Ida L. Birnie, is therefore dismissed, the insurer not being liable for the payment of any compensation under the Workmen's Compensation Act on account of the death of the said James Birnie.

JOSEPH A. PARKS.

FRANCIS J. W. FORD.

ALEX. FALCONER.

DOCTOR'S REPORT.

Name, JAMES L. BIRNIE. Date, June 3, 1914.

Autopsy at Morgue Room, John Hall, 1485 Hancock Street, Quincy, Mass. Date, June 3, 1914. Hour, 2.10 P.M.

Witnesses. — Elmer L. Paine, 1485 Hancock Street, Quincy; J. W. Stancombe, 1485 Hancock Street, Quincy; Daniel J. Hurley, 202 South Street, Jamaica Plain.

Body disinterred June 3, 1914, at Mt. Wollaston Cemetery, where it had been buried and kept in receiving tomb until June 4, 1914, when it was removed to John Hall's undertaking rooms.

Stenographer.

Anatomical Diagnosis. — Cerebral hemorrhage (non-traumatic); chronic tuberculosis of lungs with chalicosis; chronic fibrous pleuritis bilaterally; hypertrophy of left heart.

Came to his death as the result of cerebral hemorrhage — non-traumatic.

Description. — Body of a man 5 feet 8½ inches, well developed and nourished; brown hair, reddish brown mustache, body clothed in black wool suit, white shirt, collar and tie, brown stockings, white cotton underwear. Face, hair and clothing are covered with a layer of white mold. Removal of clothing exposes the skin generally covered with a moist brown mold.

Body. — Chest wall is well fixed, with formalin. Abdominal wall is less well fixed with formalin.

Subcutaneous Fat. — Measures .5 centimeter.

Peritoneum. — Cavity is moderately filled with a fluid blood having some odor of formalin.

Pleural Cavities. — Both pleural cavities are obliterated over upper lobes by extremely dense fibrous adhesions.

Pericardium. — Is smooth.

Heart. — Cavities on right are moderately dilated, walls are fixed with formalin. Wall of left ventricle is somewhat thickened, estimated thickness, 1.8 centimeters. Muscles are an opaque yellowish red. Valves and cavities are normal. Arch of aorta is normal.

Lungs. — Pleura at apex bilaterally shows increased thickness varying up to 1 centimeter. On section this thickening is due in large part to a yellowish white firm fibrous tissue inclosing slaty nodules which here and there exhibit small foci or yellow caseation. Lung substance beneath pleura at apices shows similar nodules scattered through outer part of lung substance; the rest of pleura bilaterally is thickly beset with slaty gray opaque nodules, some of the larger of which exhibit small foci of caseation. On palpation the lungs generally, though rather well fixed with formalin, have a shotty feel, and on section multiple nodules corresponding in character to those described on pleura can be readily made out. Bronchial nodes are universally enlarged, show rather marked anthracosis and contain small regions of caseation.

Liver. — Is of normal size and shape. It is preserved in part by formalin. On section cut surface is colored generally a yellowish red; markings are obliterated. Gall bladder is distended with estimated 75 cubic centimeters of a greenish yellow bile. Mucosa is natural.

Kidneys. — Are firm of normal size. Cortex measures .6 to .8 centimeter, with pyramids more slightly deeply colored than cortex. Capsule peels readily from a smooth surface. Both the pelves bilaterally are moderately distended with a blood-stained fluid.

Spleen. — Is well preserved, of normal size. On section markings are indistinct, but there is no evidence of pathological change.

Aorta. — Is slightly thickened, but is otherwise smooth and not remarkable.

Scalp. — The scalp and temporal muscles are well preserved. Hair separates from scalp on slight tension. The scalp measures .3 to .4 centimeter in thickness and exhibits no regions of discoloration or other evidence of traumatism.

Calvarium. — Measures .6 centimeter in frontal region, .2 in temporal region. Is light and translucent with little diploe.

Dura. — Is not remarkable.

Brain. — Exhibits moderate flattening bilaterally, slightly more marked on right. Pia arachnoid over convexity on right exhibits slight hemorrhagic infiltration except for the posterior portion of occipital lobe and the anterior portion of temporal lobe. The greatest degree of infiltration is found along sylvian fissure and beneath parietal eminence. Hemorrhage here is limited to the pia. Both lateral ventricles contain a small amount of blood-stained fluid. Beneath the lower and outward surface of right lateral ventricle, covered with ependyma, there is a mass of clot occupying the site of the caudate and lenticular nucleus, together with optic thalamus. Clot can be followed directly across internal capsule through gray matter to insula, to the deeper portions of sulci in region under parietal eminence. Brain is better preserved on right side than on left. Markings apart from region of disorganization by hemorrhage are normal. Fourth ventricle contains a small amount of blood-stained fluid. Ependyma of all ventricles is smooth. Vessels at the base are stiffened with formalin, but exhibit no regions of opacity and thickening.

Base of Skull. — Is normal. Subdural space is empty. Total mass of clot and disorganization of brain tissue equals estimated 120 cubic centimeters.

Opinion. — The complete absence of contusion of the scalp and the location of the hemorrhage within the brain leaves no question that death in this case was due to spontaneous cerebral hemorrhage. The extension of the process to covering membranes of the brain led to the production of a picture which on the opening of the skull suggested a traumatic process. Hemorrhagic infiltration of the pia is usually due to traumatism, but in this case the pial hemorrhagic arose by secondary extension from the mass of blood in the internal structure at the base. The location of the hemorrhage is in the distribution of the middle cerebral artery, which is the common source for spontaneous cerebral hemorrhage. It is my opinion, therefore, that the fall in this case was a consequence of

the cerebral hemorrhage and not a cause. There is appended herewith a diaphragmatic scheme of the base of the brain exhibiting the location of the hemorrhage and its extension to the pia at the insula, where membranes are in closest relation with the deep structures of the brain.

TIMOTHY LEARY,
Medical Examiner, Suffolk County.

CASE No. 739.

THOMAS GACUZZI, *Employee.*

SPENCER WIRE COMPANY, *Employer.*

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., *Insurer.*

CONDITION OF DIABETES IS DUE TO NATURAL CAUSES HAVING
NO CAUSAL CONNECTION WITH A PERSONAL INJURY ARISING
OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

The evidence before the committee showed that the employee, a wire roller, received a personal injury by reason of a sudden wrench and strain, and that at the same time, he lost his footing and fell to the floor, striking his head on said floor. Diabetes subsequently developed. The medical evidence was conflicting as to the causal relation between the injury and said diabetes.

Held, that the injury accelerated an incipient condition, and but for said injury the employee would not now be suffering to any material degree from a diabetic condition.

Review before the Industrial Accident Board.

Decision.—The Industrial Accident Board reverses the findings of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Thomas Gacuzzi v. Employers' Liability Assurance Corporation, Ltd., this being case No. 739 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of David T. Dickinson of the Industrial Accident Board, chairman, David Goldstein, representing the employee, and Edwin H. Crandell, Esq., representing the insurer, being duly sworn, heard the parties and their witnesses at City Hall, Worcester, Mass., Monday, March 30, 1914, at 10 A.M.

The committee finds that on Dec. 9, 1912, the employee, a man forty-three years of age, received an injury arising out of and in the course of his employment. His work was that of a wire roller. His average weekly wages were \$19.56.

He was lifting a roll of wire weighing about 150 pounds off of a pile on which it was stacked, in order to carry and attach it to the rolling machine near by. The roll slipped from its position and caused a sudden wrench and strain to the ligaments, tendons and tissues of the back in the region of the lumbar vertebræ and right sacroiliac joint. At the same time he lost his footing and fell over backward to the floor, and in doing so the back of his head struck on a roll of wire which stood about a foot above the floor. He testified that the effect of this blow clouded his vision for a moment, as if by floating specks or stars.

He was unable to continue at his work on account of the injury, and at once left for his home. His weight was about 250 pounds, and up to this time he had been a man of exceptional and powerful strength, working with practical steadiness for many years at heavy labor, and, so far as shown, appeared to be in good normal health.

He had been employed by this employer for seven months before the accident. His foreman testified that during this time the employee stayed away at two intervals, for perhaps two days each, for what he, the employee, said was a lameness he felt in his back; and the witness stated that as he remembered it, the employee had said at the time he thought he might be suffering from lumbago. This temporary trouble of a few days passed away, and during the rest of his employment he worked as usual, and the foreman testified that during this period of seven months the employee remained in his appearance just the same; that he had no appearance of sickness or loss of weight, and that he noticed nothing unusual or peculiar in his behavior.

The employee denied that he ever said to the foreman that he thought he had or might have lumbago.

On March 10, 1913, he returned to work and tried to perform light labor, with less lifting, but found that he was unable to do the necessary stooping in connection with tending his

machine and the rolling wire, and therefore had to give up this working trial after three days. He was paid \$6 for this three days' work. With this exception he has been unable to perform any work since the injury, and the committee finds that he has been incapacitated for work as a result of the strain and the injury to the back received at the time of the accident, with the exception of the three days mentioned.

He was paid eleven weeks' compensation at the rate of \$9.78 a week to March 10, 1913, when it was stopped by the insurer, and the employee signed the usual settlement receipt conditioned upon a right of review.

The employee, at the time of the hearing, was suffering from a serious condition of diabetes, which had shown outward manifestations some months before the hearing. He had lost 50 pounds in weight since the injury, and the foreman, above referred to, testified that the claimant looked very different, in his outward appearance of diminished vigor and health, than at the time of the injury.

For about a year before the hearing the employee had had an almost continual thirst for water, drinking about a gallon daily during this time. He had been troubled during this time with abnormally frequent urination, and its test showed a high percentage of sugar; in fact, it was loaded with sugar according to all the medical testimony, and there were also the usual accompaniments of an unmistakable condition of diabetes in its advanced and last stages. The medical testimony also showed that diabetes was normally a very gradual working disease in persons of the age of forty and upwards; that it worked rapidly towards a fatal conclusion only in the period of youth. The older a person the more gradual its processes.

The employee claimed, through medical testimony produced by him, that the diabetes was caused by the concussion when he struck his head and the accompanying shock to his nervous system, injuriously affecting the sugar center in the right ventricle of the brain.

Dr. Melvin G. Overlock, who gave this testimony, stated that in his opinion this diabetes was caused by such head concussion and shock, and that in his opinion the employee was

well and healthy and free from diabetes before the injury; that he could not have done the work he did before the injury if he had then been afflicted with diabetes to such an advanced stage as it must have been, judging from his present condition, if he had then been suffering from it, that is, before the injury.

According to the medical testimony introduced by the insurer, the diabetes was not caused by or a result of the injury. Dr. Lemuel F. Woodward, called by the insurer, testified that a blow on the head accompanied by nervous shock, or a nervous shock alone, such as fright or worry, would often cause glycosuria, that is, an abnormal amount of sugar in the urine; but that such glycosuria, so caused, was temporary and not that type which is a symptom of diabetes, and which is as permanent as the disease; and that, in his opinion, there never were any cases where concussion of the brain or nervous shock had caused diabetes. He acknowledged, however, that there were physicians and medical authors of good standing who held a contrary opinion. He stated that, in his opinion, diabetes originated and grew out of some disorder or disarrangement either of the liver or pancreas.

The committee is unable to reach the conclusion on the medical testimony that the diabetes was caused by the concussion to the head and accompanying shock, but is of the opinion that the employee was in a very slight and incipient diabetic condition before the accident; that this condition must have been very slight then and unadvanced by reason of his good general health and physical vigor, which was as well maintained as that of a normal man before the accident, and by reason of the suddenness with which the acute and last stage of diabetes developed after said accident. There seems to have been no period of normal and usual diabetes in this case or of the normal or gradual decline of the health and strength of this employee; and the committee finds that the present acute and advanced condition of diabetes of the employee was caused by the injury sustained on Dec. 9, 1912, operating on its incipient condition and rapidly accelerating and aggravating it, and that but for this injury the employee would not now be suffering to any material degree from a diabetic condition.

The employee is entitled to receive compensation at the rate of \$9.78 per week from March 10, 1913, when it was stopped by the insurer (with the exception of the three days when he returned to work), by reason of the total incapacity for work which he had been under from said March 10, 1913, to the present time, and during the further continuance thereof, and also during the total incapacity which may be caused by the diabetes, by reason of its aggravation and acceleration, as aforesaid.

This decision and all findings regarding compensation, or the existence or termination of incapacity, are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III., of the Workmen's Compensation Act, and the general provisions of said act and its amendments.

DAVID T. DICKINSON.

I approve of the above and find in addition thereto that the injury to the back as aforesaid is still a contributing cause to Gacuzzi's total incapacity for work.

DAVID GOLDSTEIN.

Edwin H. Crandell dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the above case as new matter on Saturday, May 9, 1914, at 10 A.M., in Committee Room No. 30, City Hall, Worcester, Mass., and finds and decides as follows:—

Thomas Gacuzzi, the employee, testified that he received an injury on Dec. 9, 1912, while lifting a coil of wire weighing between 150 and 165 pounds, by reason of which he sustained a sudden wrench and strain to the ligaments, tendons and tissues of the back in the region of the lumbar vertebræ and right sacroiliac joint. At the same time he lost his footing and fell over on his back, striking the back of his head on a coil of wire. He felt confused, and after a while, with the

help of some of the workmen, dressed and went home, where he remained in bed for a period of about thirteen weeks. He then returned to his employment at lighter work, but claimed that he was obliged to give up after a period of about three days. His back hurt him at that time and now aches when he walks. His side also bothers him. About five or six months after the accident he first noticed that he drank a great deal of water, and three or four months after the injury he noticed that urination was very frequent. His weight had decreased from about 280 pounds at the time of the injury to about 210 or 215 pounds at the present time. He stated that he remained away from work at different times to work in his store, the excuse being given to Mr. Lindley, representing the employer, each time, that he was sick. The reason for this was that if he told the truth he would be sent back to the shop. Answering the question as to whether he had done more than five or six full weeks' work while working for the American Steel and Wire Company during a period of two years prior to his employment by the Spencer Wire Company, he replied that there wasn't much work to do in the summer time, and that he had trouble with the machines about every day. When they did have work for him he remained away one or two days during every two or three weeks to buy stock for his store.

A Mr. Palladino, a barber, stated that he shaved the employee during his sickness, and that the latter told him that he was injured while pulling a coil of wire, and that he struck his back, hurting his head at the same time.

Salvadore Baffo stated that he lives near Gacuzzi and has known him for nine years, during which time he had never known him to be sick. Several times when Gacuzzi was away from work Baffo went to the show with him.

Max Baff, M.D., stated that he attended Gacuzzi at different times between 1904 and 1912 for bronchitis, tonsillitis, influenza, a sprained left wrist and a sprained foot. The employee informed him that the injury occurred while he was lifting a coil of wire, and he treated him for a severe sprain in the lower part of the lumbar vertebræ where it joins with the sacrum. No urinal examination was made by him. The injury referred to

will, in the opinion of the doctor, cause pain in that region, irrespective of diabetes, as long as the employee lives. If he tried to lift heavy weights now he would suffer severe pain. The injury probably caused the diabetes, and the doctor could think of nothing else which might have caused diabetes. Later he stated that the injury wouldn't cause diabetes in every case, but it possibly could. He did not say anything about the injury to the head at the previous hearing because he was not questioned about it. He was giving medical testimony only. If the accident did cause diabetes it would manifest itself within a month. Diabetes is ordinarily caused by an injury, and is the usual result of severe injuries.

William J. Delahanty, M.D., stated that it is possible that diabetes could be caused by a severe injury to the back and a blow on the head. It is sometimes possible to get diabetes from a very slight trauma. Diabetes is a disease of gradual growth. A man may have it for months without knowing it. At the age of forty-four years diabetes is not considered as dangerous to life as it is in a younger person. Dr. Delahanty has never seen a case of diabetes resulting from trauma. Sugar in the urine may be caused by a surgical operation, a shock or fright.

Joseph O'Connor, M.D., stated that it is possible that any injury to the skull which might involve brain substance, and particularly an injury to the fourth ventricle, may produce diabetes. These cases are extremely rare. It is true that all the authorities refer to severe trauma as being a possible cause of diabetes and not to slight trauma. In the cases of severe injury you might reasonably expect paralysis of some sort, loss of motion or sensory disturbance. He should say that in the case of a man who was previously in apparently good health, and who is now suffering from diabetes, with the history of probably a severe injury to the head, the diabetes could be due to the traumatic injury to the fourth ventricle.

E. Eckblom, timekeeper for the American Steel and Wire Company, stated that Gacuzzi worked in the flat wire department. He produced the time record of Gacuzzi. This shows the number of hours he worked and the compensation he received from Aug. 6, 1910, to July 20, 1912. A full week's

work consisted of sixty hours. Between 1910 and 1912 the mill was running on full time. It sometimes happens that the machines are out of order. Gacuzzi was a piece worker.

Frank Lindley testified that it was his duty to keep a personal daily record of all absences and their cause, every foreman sending him a record each morning. If a reason for absence was not given it was his custom to go to their homes to find out why they were not working. In January, 1912, Gacuzzi was out seven times for sickness; February, 1912, five times; March, 1912, once because of sickness and another time because there was no work; April, 1912, nine times for sickness; May, 1912, once for sickness in the family and two days on account of a funeral; June, 1912, five times for sickness; July, 1912, three times for sickness. He then left and went to work for the Spencer Wire Company. The information as to the cause of absence was received from Gacuzzi personally, and one time that he remembers, Dr. Baff had written a certificate covering the reason for the employee's absence. Mr. Lindley expressed the opinion that Gacuzzi's form of sickness was his dislike of night work, as sickness was the only excuse allowed for a man's absence.

Michael F. Fallon, M.D., stated that he examined Gacuzzi, as the impartial physician appointed by the Industrial Accident Board, on Jan. 22, 1914, and found that "this man's symptoms are due to diabetes, and not to an injury; nor is there causal relationship of the diabetes to an injury." The testimony, as heard by him this morning, strengthens his opinion that Gacuzzi's symptoms were caused by diabetes and not by an injury, and that there is no causal relationship of the diabetes to the injury. At the time of the examination there was no sacroiliac condition. The feeling of needles pricking his legs, and his feet going to sleep, are common and ordinary symptoms of diabetes. Cases of diabetes as the result of injuries are extremely rare. Dr. Fallon has never seen a case, and has never known a doctor who has seen a case. Von Noorden, the best authority in the world on the subject, states that he could find not more than six cases due to trauma. Gacuzzi is very fat, and a fat man is more inclined to diabetes than any other. From the description of the injury, as given

to him by Gacuzzi, it was not sufficient to cause diabetes. He said nothing about an injury to the head. Tonsillitis is a far more common cause of diabetes than trauma. The injury had nothing to do with the diabetes, either by way of cause or acceleration.

Henry F. Hughes, M.D., stated that he has never known of a case of diabetes being the result of trauma, from his own experience. From a description of the injury as it occurred to Gacuzzi he can see no reason to believe that diabetes, in this case, was caused by the injury. There is nothing in the history that would suggest anything between the trauma and diabetes. He does not deny that trauma is a possible cause of diabetes.

Lester C. Miller, M.D., stated that he does not think the diabetes from which Gacuzzi is now suffering was caused by the accident which he received, or that it had any connection with it. If diabetes is caused by trauma it has to be serious and severe trauma. The pains, as associated with diabetes, are usually those of the inflammatory or irritated condition of the nerves. There was nothing in the testimony to show that the injury to the head had been severe enough to cause diabetes.

Lemuel F. Woodward, M.D., stated that he had Gacuzzi taken to the hospital for the purpose of examination, and found that he was suffering from diabetes. He thinks there is no connection between the injury, which occurred on Dec. 9, 1912, and the diabetes. At the time of the examination the complaints were all subjective. He complained of tenderness over the right sacroiliac joint, but the motions of the joint were not abnormal. If Gacuzzi had not been suffering from diabetes he would have been back at work.

Melvin G. Overlock, M.D., testified that in his opinion this diabetes was caused by such head concussion and shock, and that in his opinion the employee was well and healthy and free from diabetes before the injury; that he could not have done the work he did before the injury if he had then been afflicted with diabetes to such an advanced stage as it must have been, judging from his present condition, if he had then been suffering from it, that is, before the injury.

The Board finds, upon all the evidence, that there is no causal relation between the injury received by the said employee, Thomas Gacuzzi, on Dec. 9, 1912, and the condition of diabetes which now incapacitates him for work, said condition being due to natural causes; that all incapacity due to the injury ceased on or prior to March 10, 1913, the date upon which the last weekly payment was made by the insurer; and that no further compensation is due the employee under the provisions of the Workmen's Compensation Act.

JAMES B. CARROLL.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 741.

NELLIE E. MERRITT, WIDOW OF HENRY MERRITT (DECEASED),
Employee.

BOUTWELL BROTHERS, INC., *Employer.*

TRAVELERS INSURANCE COMPANY, *Insurer.*

LOBAR PNEUMONIA, DUE TO EXHAUSTED VITALITY AND REDUCED POWERS OF RESISTANCE FOLLOWING PERSONAL INJURY, CAUSES DEATH. WIDOW ENTITLED TO COMPENSATION.

The evidence showed that the employee had received a personal injury by reason of a severe strain, and became partially paralyzed thereby, and that during the period of a year following said injury he was totally incapacitated for labor. About two days before he died he contracted pneumonia and died as a consequence thereof. He was unable, because of his exhausted vitality and reduced power of resistance, to resist the attack of pneumonia.

Held, that the death of the employee arose out of and in the course of his employment, the weakened condition, due to the personal injury, rendering the pneumonia fatal.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Nellie E. Merritt, widow of Henry Merritt, deceased employee, v. Trav-

elers Insurance Company, this being case No. 741 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of David T. Dickinson of the Industrial Accident Board, chairman, George L. Allard for the employee, and Arthur C. Spalding for the insurer, being duly sworn, heard the parties and their witnesses at the Aldermanic Chamber, City Hall, Lowell, Mass., Wednesday, March 11, 1914, at 10.30 A.M.

The employee, a man thirty-five years of age, received an injury arising out of and in the course of his employment on Jan. 30, 1913. His average weekly wages were \$11.60.

He was lifting, with the assistance of two fellow workers, an iron sheet, and, on account of its weight coming down upon him more than upon his helpers, received a severe strain and wrench in the back and region of the spine. He was confined to his bed for six weeks thereafter, and was in need of and received medical attention frequently until Jan. 18, 1914, when he died. He did not return to work after the day of the accident, and was paid compensation by the insurer to the date of his death.

As a result of the injury he developed a partial paralysis of the lower limbs, with loss of sensation and a partial loss of motion. He had pains all the time, and was in a weakened condition. Before the injury he was a strong and robust man and steady worker. He improved somewhat from the acute first results of the injury, but thereafter steadily declined, particularly during the two months preceding his death.

On Jan. 16, 1914, he was in a very weakened and sick condition; his physician was called, who found him suffering with acute lobar pneumonia, and he died from the effects thereof two days thereafter, Jan. 18, 1914. The employee before the coming of the pneumonia was confined to the house on account of his feeble condition; the rooms were comfortably warmed, and he had not been exposed to cold or chills.

The insurer requested the following rulings and findings:—

That on all the evidence the death was not caused by the injury received Jan. 30, 1913; that if the death resulted by reason of acute pneumonia, which was not traumatically a result of the injury, the death was not directly or indirectly caused by the injury.

The committee finds, on the weight of all the evidence, that the pneumonia resulted from the weakened condition, exhausted vitality, and the employee's reduced powers of resistance caused by the injury; that the said injury materially contributed to his death; that his death therefore arose out of the injury which he received in the course of his employment; that his widow, Nellie E. Merritt, who was living with him at the time of the injury, and conclusively presumed to have been dependent, is entitled to a weekly compensation of \$5.80, to begin from Jan. 18, 1914, the date of the last payment to the deceased employee, and to continue during the remainder of the period of three hundred weeks from the date of the injury.

DAVID T. DICKINSON.

GEORGE L. ALLARD.

ARTHUR C. SPALDING.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the evidence of the parties and the arguments of counsel on review at the Hearing Room, New Albion Building, Boston, Mass., on Thursday, April 2, 1914, at 10 A.M.

Dr. Samuel H. Littlefield, called by the insurer, testified substantially that pneumonia germs exist in most healthy persons, and are prevented from multiplying and causing pneumonia and death by the resisting power which normally exists in healthy persons; that any injury or condition which reduces or exhausts the vitality to an extreme degree greatly lessens this power of resistance, and often enables such pneumonia germs, which would be harmless in a person of ordinary vigor, thereby to gain the upper hand, with a fatal conclusion; that such fatal pneumonia, so induced, is called terminal pneumonia, and is recognized by physicians as connected with and likely to grow out of such precedent exhausting conditions; that terminal pneumonia is often, if not usually, of lobar form. The doctor testified that in his opinion the injury could not be regarded as the cause of the employee's death unless the germs of the pneumonia which were its final cause were shown to

have been present in the employee before his injury on Jan. 30, 1913, even though it was terminal pneumonia induced by the exhaustion and loss of vitality which resulted from the injury, and even though, but for this exhausted vitality, he would have warded off and overcome the attack of said pneumonia; that in his opinion if the germs did not enter the employee's system until after the injury they were to be regarded as a new agency and the sole cause of the death, and not the injury.

The Board finds that the employee was partially paralyzed as a result of the injury received in the course of his employment, and that during a period of twelve months following the injury he was totally incapacitated for labor, said incapacity continuing up to the time of his death. About two days before he died he contracted pneumonia and died therefrom; and because of his exhausted vitality and reduced power of resistance, which were caused by his injury and resulted therefrom, he was unable to resist the attack of pneumonia. He did not have pneumonia at the time of the injury, and notwithstanding the language of the court in *Larson v. Boston Elevated*, 212 Mass. 262, at page 268, we rule, following the *Burns* case, B. & T. June 6, 1914, and cases cited therein, that although he was attacked by pneumonia subsequent to the injury, the weakened condition, to which the accident had reduced him, rendered the pneumonia fatal. The Board therefore finds that the widow, Nellie E. Merritt, is entitled to compensation for the death of her husband, as found by the committee of arbitration, to wit: that his widow, Nellie E. Merritt, who was living with him at the time of the injury, and conclusively presumed to have been dependent, is entitled to a weekly compensation of \$5.80, to begin from Jan. 18, 1914, the date of the last payment to the deceased employee, and to continue during the remainder of the period of three hundred weeks from the date of the injury.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
JOSEPH A. PARKS.

CASE No. 742.

GEORGE E. ELDREDGE, *Employee.*

W. L. DOUGLAS SHOE COMPANY, *Employer.*

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., *Insurer.*

EMPLOYEE NOT HAVING USEFUL VISION IN INJURED EYE IS NOT ENTITLED TO SPECIFIC "ADDITIONAL" COMPENSATION FOR ENTIRE LOSS OF VISION BY REASON OF INJURY.

The evidence showed that it was probable that there was potential, or possible, vision in the right eye prior to the occurrence of the injury; that the restoration of vision following an operation would be useful only in the event of a great or total loss of vision in the uninjured left eye; that the injury destroyed any possibility of ever restoring sight to the right eye; and that, prior to the occurrence of said injury, the employee had less than one-tenth vision in said right eye.

Held, that the employee was not entitled to the specific "additional" compensation for the reduction of vision to one-tenth of normal with glasses.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of George E. Eldredge v. Employers' Liability Assurance Corporation, Ltd., this being case No. 742 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Edward F. McSweeney of the Industrial Accident Board, chairman, John P. Meade, Esq., of Brockton, Mass., representing the employee, and Walter I. Lane, Esq., of Brockton, Mass., representing the insurer, heard the parties and their witnesses at the Reading Room of the Brockton City Hall, Brockton, Mass., Monday, March 23, 1914, at 10.45 A.M.

George E. Eldredge, eighteen years of age, residing at 561 North Montello Street, Brockton, was employed in the gang room of the W. L. Douglas Shoe Factory No. 1, nailing heel seats, at an average weekly wage of \$14, he being a piece-worker. Said W. L. Douglas Shoe Company is insured with

the Employers' Liability Assurance Corporation, Ltd. On Oct. 17, 1913, while employed at his regular work, Eldredge stooped to pick up a shoe, and while so doing a spindle flew up and struck him in the right eye. Since that time he has been unable to distinguish, with the right eye, darkness from daylight, which he could do previous to the injury.

For the disability arising out of this injury, Eldredge has been paid by the insurer the total sum of \$71, and has returned to work.

The claim is made by the injured employee that he is entitled to the fifty weeks' additional compensation provided in section 11 (b), Part II. of the act, for the reduction to less than one-tenth of normal vision, with glasses, in the right eye.

The facts, as disclosed by the evidence, are that some time in 1908 or 1909 Eldredge, then a boy of thirteen or fourteen years of age, was struck with a plaything, called a tick-tack, in the right eye. He bathed his eye and suffered no further inconvenience, but a year or so later, discovering that vision was failing in that eye, he consulted Dr. Murdock of Brockton, an eye specialist, who told him that a cataract had formed in the right eye, which in nine or ten months would be in a condition for operation. Eldredge's parents and himself put the operation off from time to time; after finishing school he went to work, and at the time of the injury was working, as hereinbefore stated.

After the evidence was submitted it was agreed by all the parties that the injured employee would submit the names of three expert eye doctors, and from these three names the insurer would select one to make an impartial examination of Eldredge's eye, and report back to the Arbitration Board. In accordance with this agreement the names of Drs. Daly, Madden and Quackenboss were submitted, and the insurer selected Dr. Daly, who examined Eldredge on April 14.

Dr. Daly was requested by the Industrial Accident Board to answer four questions in relation to Eldredge's eye. His reply was submitted on April 4, 1914. The questions asked by the arbitrators, with Dr. Daly's replies thereto, are as follows: —

Q. Under the circumstances described herein, was there potential sight in Eldredge's right eye in October, 1913?

A. This somewhat depends on whether the traumatic cataract was uncomplicated, making it operable, as there are cataractous conditions following injuries which are inoperable because of adhesions, synechiæ or inflammatory exudate. Objectively, it is now impossible to say whether, prior to October, 1913, he had an uncomplicated traumatic cataract. The history, however, is specific. After being struck during the game he went home immediately and bathed his eye. He suffered no further inconvenience, and only one year later, when visiting Dr. Murdock concerning cause of the poor vision in that eye, did he know of existence of a cataract. Such a history would show, or would tend to show, that there had been a traumatic cataract, uncomplicated as the result of the blow. And if there existed an uncomplicated traumatic cataract there was potential sight in October, 1913.

Q. If an operation on or before Oct. 17, 1913, would restore vision in Eldredge's right eye, would that vision be useful vision?

A. No. The restored vision following operation of the right eye, no matter how great in degree, would only be useful in event of loss, total or great loss, of the vision of Eldredge's left eye.

Q. If there were potential sight on or before October 17 last, was it destroyed by the injury received at the Douglas factory on that day?

A. Yes.

Q. What is the present condition of his right eye?

A. Phthisis bulbi, a condition of disorganization of the globe of the eye with its contained tissues, and associated with a shrinkage of the ball as a whole.

The arbitrators find, regarding the question at issue, to wit whether George Eldredge is entitled to compensation under paragraph (b), section 11, Part II. of the act, that on or before Oct. 17, 1913, there was no useful vision in his right eye, and that in consequence thereof he is not entitled to the additional fifty weeks' compensation, as provided by said paragraph (b), section 11, Part II.

EDW. F. MCSWEENEY.

WALTER I. LANE.

John P. Meade dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties and their witnesses at the Hearing Room, New Albion Building, Boston, Mass., on Thurs-

day, June 11, 1914, at 11.15 A.M., and affirms and adopts the findings and decision of the committee of arbitration.

The evidence shows that it is probable that there was potential or possible vision in the right eye prior to the occurrence of the injury received by the employee, George E. Eldredge, on Oct. 17, 1913; that the restoration of vision following an operation would be useful only in the event of a great or total loss of vision in the uninjured left eye; that the injury destroyed any possibility of ever restoring sight to the right eye; and that, prior to the time of said injury, the said employee had less than one-tenth vision in said right eye and could only distinguish darkness from daylight.

The statute provides for the payment of additional compensation for a period of fifty weeks if the employee, by reason of a personal injury arising out of and in the course of his employment, sustains a reduction to one-tenth of normal vision in either eye with glasses. No provision is made for the payment of this additional compensation for the loss of potential vision which may possibly be developed as the result of an operation.

The Board finds, upon all the evidence, that the employee, the said George E. Eldredge, is not entitled to additional compensation under Part II., section 11 (b), the personal injury sustained by him not having caused a reduction in vision to one-tenth of normal, with glasses, in the right eye.

JAMES B. CARROLL.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 744.

MARY A. MURPHY, WIDOW OF JOHN T. MURPHY (DECEASED),
Employee.

O. A. MILLER TREEING MACHINE COMPANY, *Employer.*

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., *In-*
surer.

BOARD FINDS THAT DEPENDENT WIDOW IS NOT ENTITLED TO
COMPENSATION. THE EVIDENCE LEAVES THE MATTER OF
THE CAUSE OF DEATH IN DOUBT. CASE TAKEN BY AP-
PEAL TO SUPREME JUDICIAL COURT.

The employee remained at the factory of the subscriber on Saturday, March 1, 1914, for the purpose of performing certain duties. He remained there all Saturday night and was found by his superior Sunday morning when the latter went to the factory on business. At about 10 o'clock Sunday the employee was engaged at work at the furnace, and when his superior later saw him he looked like a man who had fallen into the coal bin, and was perspiring very freely. A short time afterwards said superior heard moans, and returning, found the employee frothing at the mouth and stiffening up on one side. Death occurred in a short time.

Held, that the widow was not entitled to compensation.

Review before the Industrial Accident Board.

- *Decision.*—The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to Supreme Judicial Court.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Mrs. Mary A. Murphy, widow, *v.* Employers' Liability Assurance Corporation, Ltd., this being case No. 744 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of Edward F. McSweeney of the Industrial Accident Board, chairman, James S. Allen, Jr., of 41 Myrtle Terrace, Winchester, Mass., representing the employee, and Walter I. Lane, 306 Home Bank Building, Brockton, Mass., representing the insurer, heard the parties and their witnesses at the Hearing Room of the Industrial Accident Board, New Albion Building, Boston, Mass., Friday, March 27, 1914, at 2 P.M., and Monday, April 6, 1914, at 2 P.M.

John M. Morrison, Esq., appeared as counsel for the insurer, and George W. Abele, Esq., for the widow.

The facts in this case appear to be as follows:—

John T. Murphy, aged thirty-five, carpenter by occupation, was employed by the O. A. Miller Treeing Machine Company at an average weekly wage of \$24, the employer being insured under the Workmen's Compensation Act in the Employers' Liability Assurance Corporation, Ltd. It is agreed that Murphy's average weekly wage was \$24, and that at the time of his death he was living with his wife, Mrs. Mary A. Murphy, and their three children, aged seven, five and three, and under the act Mrs. Mary A. Murphy is, if it is shown that the death arose out of and in the course of his employment, conclusively presumed to be dependent upon her deceased husband for support, and is entitled to one-half his average weekly earnings at the time of his decease for the period provided by the act.

Mr. Abele, the attorney for the dependent widow, claims that John T. Murphy died on March 2 as a result of an injury arising out of and in the course of his employment, to wit, poisoning by the fumes of the chemicals used in the experiments carried on at the Old Angier Mills; that the employer had actual notice of the accident at the time it occurred, and, therefore, the dependent is entitled to recover under section 18, Part II.

The insurer, through Mr. Morrison, its attorney, denies that Murphy's death arose out of and in the course of his employment, and further claims that as death was on March 2, 1913, and first claim for compensation or notice of injury being dated Jan. 26, 1914, no proceeding for compensation can be held because the notice as required by sections 16, 17 and 18 of the Workmen's Compensation Act has not been properly given.

The arbitrators find that the essential facts are as follows:—

The employer, the O. A. Miller Treeing Machine Company, whose regular place of business is in Brockton, Mass., secured control of and remodeled a factory called the Old Angier Mills at Quincy, Mass., in which to make certain experiments, particularly regarding a new composition for box toes in shoes, which was a secret process. The deceased Murphy was told

by Mr. Cox of the company that if he wanted a good steady job he would give it to him at the Old Angier Mills for the Miller Company, and on or about Aug. 19, 1912, arrangement for him to go to work at a weekly salary of \$24 was finally made. The agreement was that Murphy would have no regular hours, would be subject to call at all times, including Sundays and evenings, and would do any kind of work he was asked to do on call, and in addition to carpenter work was to help around generally. It further appears that the O. A. Miller Treeing Machine Company is a subsidiary of the United States Shoe Machinery Company, and the experiments in the Old Angier Mills were intended primarily to be used in the development of the manufacture of shoes. As the experiments progressed, however, an attempt was made to develop a non-inflammable film for moving pictures.

There was evidence that in the early part of the week which ended on Saturday, March 1, 1913, manufacture of the product at the Old Angier Mills was temporarily discontinued to allow the chemist in charge to go to Chicago. Besides Murphy, an Italian boy, named Pasquale, was engaged around the plant to look after the furnace, etc. There was no work to keep the two employed during the week of the chemist's absence, so the Italian boy was given leave, and Murphy was retained to do the odd jobs around the factory, and to look after the furnaces. On Wednesday and Friday evenings this work kept him later than usual, so that he did not get home until about 8 P.M. On Saturday morning Mr. Murphy carried his lunch as usual and went to work. Mr. Hannigan, his employer, who went to the factory almost every morning to confer with Mr. Murphy, on Saturday morning had a talk with him there about certain work which was to be done, and looked over plans in connection with future work, and Mr. Hannigan prepared to leave the factory some time after 11 A.M. Mr. Hannigan testified that there was a small pile of dirt remaining after sweeping the floor, and he told Murphy to clean that up and then go home and to return when it was necessary to take care of the furnaces; this would require not more than two visits a day. Mr. Hannigan expected that Murphy would go home, as there was nothing at the factory for him to do. From the

evidence Murphy was a man of good habits, who was regularly at home, and his wife expected him to return home that Saturday night. He did not return home after 11 A.M. on Saturday, March 1, or at any time after Mr. Hannigan saw him. In the evening his wife received a telephone message, forwarded to her from a pay station in the store of Mrs. Tina Booth, purporting to come from her husband, that he had to do some work which would detain him until quite late, and he would come home as soon as he got through; he telephoned because he was afraid that she would be worrying about his delay. It also appeared in the testimony that during the afternoon and evening of Saturday some one telephoned to the Hannigan house in Braintree, saying to Mr. Hannigan's wife and daughter, who received the message, "Tell Mr. Hannigan everything is all right." Mr. Hannigan did not know why these messages were sent, but supposed it was Murphy that sent them. There was no mixture of substances made in the tank after January, but the material manufactured was used in an experimental way. It was kept in covered crocks around the factory. The only time that Murphy came in contact with the raw material was when he, with the other employees, changed the filter in the tank. The temperature at the factory was kept at about 70°, according to the Italian who usually cared for the furnaces.

Mrs. Murphy testified as to the facts of her husband getting the job, and said that up to this time he had perfect health, and had never complained until he started to experiment on moving-picture film material. Later she was told that the factory was working to invent a fire extinguisher. At the factory they kept her husband ignorant of what they were perfecting there. Mr. Cox had told her husband that he was to do carpenter work, and help out perfecting the moving-picture film. Mr. Murphy had cleaned out the tank twice to her knowledge. The first time was around February 1 or February 2, and at this time he was overcome. Her husband had explained how he was overcome, and how they took him out of the tank and revived him, and that Mr. Cox had laughed and joked about it. The second time her husband went into the tank was a week later. Her husband looked poorly when he came home that evening, and she inquired if he had been

in the tank again, and he replied that he had. She told him that they would put him in once too often, and her husband replied that there was nothing there to harm anybody. He had told her he felt kind of suffocated after he got out of the tank. The Monday previous to his death, her husband had come home with his hands all burned from stuff he had been mixing. Mrs. Murphy told him that if this material, which would thus burn his hands, was also going down his lungs, it would certainly kill him, to which Murphy replied that there was nothing there to harm. He had got a spatter of the stuff on his lips, and it had taken the skin off, the same as on his hands. The Wednesday previous to his death Mr. Cox turned the keys over to Mr. Murphy, leaving him in full charge. Mr. Murphy agreed to look after the furnaces. On March 1 he left home to look after the furnace, and work all day at the factory. He took with him a sandwich and a pint bottle of coffee. He stated that he would return home just as soon as through, and was sorry that he had told Mr. Cox he would take care of the furnaces, as it was a hard job. About 7 o'clock Saturday evening, she received a telephone call, purporting to come from her husband, which she never could really believe, that he had some work which would detain him quite late, and would come home as soon as he got through, and had telephoned because he was afraid she would be worrying. An affidavit by Miss Tina Booth, who received this message, stated that she knew Mr. Murphy very well, recognized his voice, and was positive that it was he who talked, saying his work would detain him quite late. He did not return home Saturday evening. Sunday morning, about 8 o'clock, Mrs. Murphy sent her oldest little boy with a note to her husband's brother, telling him that something must have happened at the factory, and asking him to go and look her husband up. The first she knew of her husband's death was when they sent from the Quincy Hospital to find out what undertaker she wanted. Mr. Hannigan could easily have telephoned to the nearest store because he called her husband up at 8 or 9 o'clock on Friday evening. Mr. Murphy had a general agreement with Mr. Cox to work Sunday morning. He usually worked Sunday forenoons, cutting out stock, etc. Mr. Murphy, when he left the house

Saturday, had 32 cents in his pocket, and he returned with 27 cents from the Quincy Hospital, which left 5 cents for car fare between Quincy and Wollaston. They had been married for eight years, and Mr. Murphy had a doctor four years ago for tonsillitis, and never had a convulsion. Witness testified that previous to the Wednesday prior to her husband's death he had come home at 5, 6 or 7 o'clock, whenever he got through work. Wednesday and Friday evenings previous to his death he got home at 8 o'clock. Mr. Murphy could drink a glass of beer at his dinner and one at his supper, but he never drank to excess or showed signs of it. He never lost any time through drink. He always turned his money over to her, and she gave him whatever money he needed.

Mrs. Mary Breault and her husband, Edward Francis Breault, testified substantially to the same effect, — that Mr. Murphy had told them about working in the mixing tank, and having been overcome, as a result; that he looked pale and dazed at these times, and subsequently they were told that his appetite failed and he did not feel so good as formerly. On the day Mr. Murphy died Dr. Welch was called to attend Mrs. Murphy. When he heard what had happened to Mr. Murphy he said to Mrs. Breault that he bet the man had been overcome, and no one was there to help him. He knew they were not treating him for what was the matter.

Herbert Griffin testified that he lived in Quincy, and was a member of the Quincy fire department. He had known Murphy for eighteen or twenty years, was a member of the fire department for fourteen years, and knew Mr. Murphy longer than that time. Among his duties he kept a record of every fire for the last fourteen years, and produced at the hearing a book containing these records. The last fire Murphy was called to was on Wednesday, Feb. 26, 1913, box 716, about 7.21. A mattress was on fire. Murphy did not reach the fire, as the recall came before he got there. It was customary for men on the route to turn around, when the recall sounded, and go back to the engine house. The last fire Murphy attended was 11.15, Friday, Feb. 21, 1913. All they did was to dump the chemical tank over the automobile. Murphy's health seemed all right. On February 26, when

Murphy got back to the station, after having turned back when the recall sounded, he noticed that his hands were black, and he asked him why he did not wash them. Murphy said he couldn't get the stuff off, and Griffin told him to come downstairs and he would take it off with gasoline. Murphy replied that nothing would take the stain off.

Mr. Hannigan testified that on Sunday morning his boy wanted a calendar that was at the Angier factory. The calendar had large figures on it. He took him over there in his automobile. When he reached the door of the factory, at about 10.30 to 10.40 A.M., he heard Murphy at the furnace. He did not attach any importance to this, only thought at the time that he was there rather late in the day for this purpose. He went into his office, and began to read some letters. He had a cigar, but did not have a match, and sent his little boy downstairs to get a match from Murphy. The boy shortly after came up with two matches. After this, he heard some noise downstairs, and went down to see what was the matter. He found Murphy sitting on a box before the furnace. He noticed that Murphy was dirty, and looked as though he had fallen into the coal bin and rolled over. Murphy was doing something with a furnace in which the fire had gone out. The furnace was full of coal, and the sweat stood out in drops on Murphy's forehead. Witness Hannigan thought Murphy had been drinking, and asked him if this was so. Murphy replied that he hadn't drunk a drop, and said that he wasn't feeling well. He had a paper in his lap, and started to get up and explain that he had not been drinking. Mr. Hannigan told him to come over and sit down, and took him into a corner and sat him in a wheelbarrow. He asked Murphy if he wanted to have his wife know, and he replied that he did not, that he had had those spells before. Mr. Hannigan then went upstairs. He soon heard Murphy moaning, and went downstairs again. He told Murphy that whether he wished it or not, he would send for a doctor. He called up every doctor in Quincy, and finally the operator suggested a Dr. McCausland. Looking out the window he saw Mr. Whalen coming along, beckoned to him to hurry, and told him that Murphy was sick. (Mr. Whalen is an employee and witness in this

case.) Murphy kept getting out of the wheelbarrow and lying on the cement floor. He finally got angry at Hannigan putting him back, and said he wanted to remain on the floor. Mr. Hannigan and Mr. Whalen then washed Murphy's face, and after this he seemed to lapse into unconsciousness. About 11.20, as the doctor arrived, a man came in who said he was Murphy's brother. At this time Murphy was in a semiconscious state, frothing at the mouth, and stiffening up on one side. The doctor ordered him sent to the hospital immediately. Mr. Hannigan telephoned the Quincy Hospital and couldn't seem to make the nurse understand how sick Mr. Murphy was. The nurse told him that he was not eligible for admission. The doctor then went to the telephone, and about twenty-five minutes afterward the ambulance arrived. Mr. Hannigan called up the hospital after he got home, and was surprised to learn that Murphy was dead. After this, his wife and daughter told him of the telephone messages they received on Saturday.

Hannigan further stated that while Murphy was being taken away from the factory, a man whose name he did not know, and whom he could not identify, asked him why the factory was lighted up the night before. This man told him the factory was lighted at 11.30, and witness testified that the factory should not have been lighted at this time. Regarding the work done, Murphy had made a table, 120 feet long, on which was laid glass 20 inches wide, and the liquid, of the consistency of thick syrup, was poured by hand on this glass by Mr. Whalen. It was allowed to dry twenty-four hours until it became hard and transparent, about five or six thousandths of an inch thick. It was no part of Murphy's duty to have anything to do with the manufacture of the film producer. Mr. Hannigan did not know whether Murphy ever went into the mixing tank. It was not necessary for Murphy to return to the factory Saturday afternoon, if he went home at 11.30, as he supposed he had, and he did not know Murphy had not gone home until his brother came Sunday morning. His brother asked Mr. Hannigan if Murphy had been drinking. Witness never told Mrs. Murphy that her husband had telephoned him to come down to the factory on Sunday morning, because he was not feeling well. The only work he had laid

out for Murphy on Saturday morning was to sweep out the office. As to the ingredients used in the compound he knew that there was a cellulose product, — tetrachloride; he knew spirits entered into it, — alcohol, castor oil in small quantity, and occasionally wintergreen to give it a pleasant odor. He did not believe that Murphy was drinking when he was found, because he thought that he would have smelt it when he lifted him up. Mr. Hannigan testified that Murphy was a steady, conscientious, industrious workman; he never had an employee he liked better. The furnaces in the basement where Murphy was found were used exclusively for heating. The tank in which the chemicals were kept was on the second floor. Underneath the mixing tank was a receiver where the material filtered down through gravity. It is a vessel with a shaft in the center, turned by motor, with long arms, flat pieces of steel 2 inches wide and 18 inches long that revolve around, a good deal like a washing machine. This broke up the cotton. The cotton is about 3 inches long when it goes in. It soon becomes a plastic mass; by constant agitation the solvent reduces it to liquid. The chemicals were usually kept in an iron tank and the cotton in a wooden case. When he got into the factory on Sunday morning the pile of dirt on the floor which he had directed Murphy to sweep up the day preceding was not swept up as directed.

Mr. Edward E. Cox of 38 Eddy Street, Quincy, testified that he was a chemist, and had charge of the men at the Wollaston plant. He described the plant and the layout of the factory. There were chemicals on the shelves of the laboratory, but these were contained in air-tight bottles. There was no chance of the chemicals from the laboratory giving out odors, except as they might be in use. The chemical compounds used in the box toes were the same as used for films. The ingredients were tetrachloride, wood alcohol, castor oil, wintergreen and occasionally a filler, like clay, soapstone or something of that sort. In mixing, they mixed the tetrachloride and alcohol, and this mixed like water. This, in turn, was mixed with oil, and into this was put a certain amount of cotton. They had worked on these ingredients in the same way for probably four or five years. Mr. Cox testified that he touched these in-

gredients with his hands frequently, but never got a burn from them. When he worked on the films Mr. Whalen spread the material. The odor came in the course of drying. The evaporation of the solvents, which frequently took more than twenty-four hours, depended upon the condition of the weather. To Mr. Cox's knowledge, Mr. Murphy went into the mixing tank twice: once when the bushings to the revolving arms needed attention, which work took ten or fifteen minutes, and another occasion when Mr. Jacobs was on to repair the tank. This time Murphy held the bolt heads so that Mr. Jacobs could move the nuts. In addition, Mr. Murphy went into the storage tank, but never after the material was put in. The first time any material was ever put in the storage tank was after the last time that Murphy went into it. When Murphy went into the tank with Jacobs it was the Monday before he died. Mr. Jacobs remained in the tank about an hour, Murphy, ten or fifteen minutes. Mr. Cox stated that he would have no hesitation personally about getting into the mixing tank, but the opening was not large enough for him, as Murphy was smaller than he was. Previous to the time Murphy went into the tank, the Monday of the week that he died, the tank had not been used for mixing from the middle of January, and nothing had been put into it from that time until Mr. Murphy went into it. On the Monday previous to Murphy's death, when he went into the tank, there was a thin film of material, one one-thousandth of an inch on the surface, which was quite dry. It did not give out such an odor as would seriously bother one. Murphy had nothing to do with the working out of the material. His duties about the plant were millwright, carpenter, general utility man, etc. Mr. Cox testified that the mixing was always done by himself. Murphy aided by bringing in the cotton, which was similar to that found in any dry goods store. There was never any fire extinguisher made at this factory, and never any thought given to making a fire extinguisher. Mr. Cox left the factory on the Monday before Murphy died. There was no manufacturing done during this week, and no material had been put in the mixing tank since January, because the tank was not in a proper condition. Murphy was a fireman connected with the Quincy fire depart-

ment. When he took exercise he was sometimes short of breath. Often a fire alarm would sound, and he would hurry, and after this would show the effects in short breathing. On one occasion in particular Mr. Murphy came back to the factory out of breath; he was almost unable to navigate. Mr. Daum helped him to a chair, gave him water and opened the windows. Mr. Cox could not give definite times for these occurrences. Making the box toes was a matter of only two or three months. Previous to that it had been all experimentation. Mr. Cox could not say that Murphy was not a drinking man. He would take a drink occasionally, but he had seen only slight evidences of drink. On these occasions he sent him upstairs until he felt better, when he went to work. He could not testify as to the last time this happened, because it did not make a lasting impression. After January 1, when no work was done with the tank, a few shoe forms were made, and the material manufactured was used as a finish to the wood, similar to varnish, either by spreading or dipping. There were a few bottles of this liquid on hand when Mr. Murphy died. This liquid was in crocks kept around the factory, sealed, and always covered, because otherwise the liquid would dry out. The cotton used was cellulose acetate, a patented article. The only thing Mr. Cox knew about it was that it was treated with amidoacetic acid, which changes the fiber so that it becomes soluble. There was ether in the laboratory, but it never entered into the composition of the material. Tetrachloride is ether of the lower order. It contains two atoms of carbon, two of hydrogen, four of chlorine and is made by a secret process in Germany. In the mixing, no gases were formed or released. The combination of tetrachloride and alcohol has a dissolvent effect on the cotton tissues, reducing it first to pulp. No heat is generated and no gases are generated. All is done in a plastic vessel. In mixing the ingredients the box was not covered until all the ingredients were put in. Then the power was turned on. During the process the box was kept covered because they wished to turn out a film that was very clear and transparent. Nitric acid does not enter into the composition at any stage. Chemical reaction was not the reduction of the cotton by

acetate, but by dissolving the cotton fiber, the result of this chemical action being decomposition. The greatest quantity of material used in the mixing tank prior to Murphy's death was 20 gallons. The waste material was mixed over and turned back into liquid. Some of it got on the floor, got dirty, and was wasted, and this was put into the furnace. It simply melts, and will not burn, and the result is a charred form. He had never heard of any odor from it. This material, when made, is spread on cotton, linen, felt and perhaps 50 different fabrics of which box toes are made. Frequently, in mixing, Mr. Cox put his hand into a batch of cellulose, and it never had any effect. He testified that there were fumes from tetrachloride. They were not astringent, but had a pleasant, sweetish smell. One person might say it resembled chloroform, another ether. The acetate used was of the highest grade, with no fumes or biting qualities. When the filter was changed it was done by Murphy, Whalen, the boy Pasquale and the witness, two or three working together. In these cases Murphy did come in contact with the raw material, but not at any other time. Murphy never made any complaints about taking the filter out, but rather always considered it a joke. When he went into the tank it was dry, and the material would not stick to his stockings. Chemical list, as submitted by Miss Lowney in her evidence, was a true list of all the chemicals contained in the factory, some of which had been brought from Brockton to Wollaston, and had never been used. He never noticed any suffocating effect, either from the mixing or the storage tank, and never heard of any one swooning. Whether Mr. Murphy could have been overcome by the fumes, Mr. Cox testified that there were times when Murphy got tired and fatigued, and had to take time off to rest, but this was not due to the influence of the work he was doing.

Miss May E. P. Lowney, inspector of the Industrial Accident Board, testified that she made an inspection of the factory on April 1. She described the shape of the rooms and their contents. In one of the rooms she got an odor more or less like ether, and which she was sure would be stifling if she were obliged to breathe it for any length of time. In the chemical laboratory, as she was making a list of the chemicals, she

found a cloth which was soiled, and looked as though it had been used for cleaning purposes, and she got the same odor from it that she got upstairs near the machine. This odor did not permeate the building, and it was only when she was close to it that she noticed it. She was there when Pasquale tended the furnace, and there was no odor in the basement. She got the same odor from the dry material. Smelling a sample of the material presented at the arbitration hearing, Miss Lowney stated that she got an odor from it, but it was not the same odor she got at the factory. The odor was not as penetrating or as pleasant. Attached is a list of the chemicals found at the factory.

Mr. Whalen testified that he represented the O. A. Miller Treeing Machine Company as traveling salesman. He worked on the material, film making, five or six times. Spreading was never done on Sundays. The film was sometimes cut on Sundays, and he had worked on Sundays, thus cutting the film. It was never rolled on that day. He was there a good many times when the material was mixed by Mr. Cox. He had never seen Murphy helping with the mixing. He had always seen him doing carpenter work, and on Sundays had seen him cutting the dried material off the glass in the form of film. He had experienced no ill effects from working on this material, and he did not think that it was possible that ill effects could be experienced by any one.

Pasquale Colicco testified that he worked at this mill for twenty months. He was laid off during the week Mr. Cox was away. He saw Murphy on Saturday morning previous to his death. He was down at the factory at 8 o'clock, and showed Murphy how to care for the furnaces. He stayed in the factory two or three hours, and left with Mr. Hannigan in his automobile. Mr. Hannigan told Mr. Murphy to clean up the office, sweep up the shavings and go home. He had gone into the mixing tank twice, and on these occasions had felt dizzy. He had helped Mr. Cox to mix. Murphy had never helped in the mixing; he simply handed the cotton, and did not come as near the material as witness did, doing only the carpenter work. When taking off the filter Mr. Murphy and Mr. Cox helped. He was laid off on Wednesday, February 26.

His clothes had never got eaten nor fallen to pieces. Murphy had sent him out to buy two pairs of stockings for a quarter, but the times that Murphy bought the stockings there were holes in the heels of the old ones, and he did not know whether or not Murphy threw away the old ones. He had seen Murphy in the mixing tank twice, and then he took his shoes off. He was in the mixing tank once with Mr. Murphy, and once when Mr. Cox was there.

Dr. George B. Magrath, medical examiner for Suffolk County, testified, at the request of Mrs. Murphy, that he examined Murphy's body on July 7, 1913. He had been requested to do this some time previously, but was unable to make the necessary arrangements with the cemetery people. He did this without charge to Mrs. Murphy. The body had been embalmed and was in a state of preservation such as to render post-mortem examination satisfactory. He was able to report that death was not due to any organic trouble. In his opinion Murphy did not die of apoplexy or any organic disease of the heart, lungs or brain. He could not, after a body had been interred for such a length of time, determine whether or not death had come from suffocation. He found nothing to indicate tonsillitis and no evidence of diabetes. Dr. Magrath could not say from his examination what was the cause of Murphy's death. It is possible for poisonous fumes to be inhaled to cause death without making change in the body. It depends on the poison whether it leaves evidence. He found no evidence of apoplexy or embolism. The heart showed no disease.

Dr. McCausland, the doctor called in to treat Murphy at the factory on Sunday, March 22, and who had him taken to the hospital, testified that when he first saw Murphy he thought he was suffering from an attack of apoplexy, and Dr. Welch and Dr. McLellan, who had later examined him at the Quincy Hospital, both of whom had since died, had agreed with him in this diagnosis, but none was put on the hospital card by Dr. McLellan, who signed the card, a fact explained by Dr. McCausland as meaning that Dr. McLellan was in doubt. After listening to Dr. Magrath's report of his autopsy he did not think Murphy had died of apoplexy, but he could not now say what was the real cause of death.

Dr. Fred E. Jones, medical examiner for the Quincy district, testified that after Murphy had died he had made the usual inquiry into the cause of death; and after getting the opinions of the three doctors who had seen Murphy, and considering all the circumstances of his sickness and death, he had accepted apoplexy as being the cause of death, and had so officially certified. After listening to Dr. Magrath's report, he did not now believe that Murphy had died of apoplexy, and did not know what was the cause of death. Some irritation of the larynx would produce œdema resulting in asphyxiation; there might be a swelling which would bring about insufficient air supply into the lungs resulting in œdema. He had never heard of a case where astringent acid fumes caused swelling, obstructed the air passages or caused astringent acid asphyxiation. He could not imagine how death could have been caused by fumes nor did he notice signs of progressive œdema of the larynx.

Upon request of the committee Dr. George M. Sheahan certified that he had been the family physician from January, 1909, until the time of Murphy's death, and that during that time Mr. Murphy was never to his knowledge affected with any cerebral, circulatory, pulmonary or nervous disturbance of any kind.

In reply to an inquiry by one of the arbitrators Dr. Magrath excluded asphyxia as a cause of death. The symptoms shown when the man was first seen by Dr. McCausland were not explained by autopsy, and Dr. Magrath was at a loss to know how to account for them. Regarding epilepsy he said: —

This in its classical form (excluding so-called "Jacksonian epilepsy") is a functional rather than an organic disease affecting the central nervous system, and is of itself rarely if ever the cause of death. When death does occur incidental to an epileptic seizure it is usually because of asphyxiation due to vomiting, which may occur during an attack, or because of the cutting off of the supply of air from the lungs by pressure or other conditions resulting from the position taken by the body in the course of a convulsion. In line with this proposition is the suggestion which you offer relative to Mr. Murphy's lying where coal dust was abundant. But I do not understand that he had ever before suffered from epileptic fits; and while it is possible for an adult suddenly to be stricken with the disease, it is uncommon.

After careful consideration of all the facts in the evidence brought forth in this case, the arbitrators are unable to determine what was the cause of Murphy's death, this being wholly a matter of conjecture, and therefore are unable to find that John T. Murphy's death on March 2, 1913, arose out of his employment. The arbitrators find that under Part II., section 18, want of notice was not a bar to proceedings under the act, it being shown that the subscriber had knowledge of the injury, and further find that since it cannot be determined that John T. Murphy's death arose out of his employment, his widow, Mary A. Murphy, is not entitled to compensation under the Workmen's Compensation Act.

EDW. F. MCSWEENEY.
WALTER LANE.

James S. Allen, Jr., dissents.

List of chemicals found in the Factory.

Acids: —

Sulphuric.
Nitric.
Acetic.
Ammonium sulphide.
Silver nitrate.
Calcium chloride.
Potassium chromate.
Magnesium sulphate.
Cupric sulphate.
Ferric chloride.
Potassium ferricyanide.
Potassium ferrocyanide.
Mercurous nitrate.
Ammonium oxalate.

Crystals: —

Mercury protonitrate.
Sodium cobaltic nitrite.
Ammonium chloride.
Ammonium sulfocyanate.
Potassium bichromate.
Potassium ferrocyanide.
Potassium ferricyanide.
Copper sulphate.
Celluloid cement.
Solution 10-Eastern Drug.
Spirit mahogany.
Oil wintergreen Merck.
Chloroform Merck.

Acetone Merck.
Sodium hydroxide.
Ammonium sulphate.
Carbon tetrachloride.
Acid phosphoric.
Calcium sulphate.
Sodium phosphate.
Barium chloride.
Sodium hydroxide.
Ammonium sulphide.
Calcium chloride.
Ammonium carbonate.
Lead acetate.

Acids: —

Nitric.
Hydrochloric.
Ammonium hydroxide.
Calcium oxide.
Iron protosulphate.
Sodium phosphate.
Sodium caustic.
Zinc metallic.
Calcium chloride.
Calcium sulphate.
Barium chloride.
Magnes-sulphate.
Potassium sulfocyanide.
Ammonium oxalate.
Ammonium carbonate.

Mercury bichloride.	Flake white.
Lead acetate.	Burnt senna.
Bismuth.	Raw umber.
Iron perchloride.	Chinese wood oil.
Potassium iodide.	Water glass.
	Alum.
Powders: —	Chloroform.
Zinc oxide.	Beachwood creosote.
Potato starch.	Formaldehyde.
Acid molybdic.	Pyrogallic acid.
Acid oxalic.	Benzine.
Acid citric.	
Acid boric.	Oils: —
White shellac.	Citronella.
Premo asphaltum.	Myrbane.
	Wintergreen.
Tank: —	Lavender flower.
Carbon tetrachloride.	
Barrel columbian spirits.	Iron.
Hem. pur.	Steel.
Inodoro.	Phenolphthalein solution.
Turpentine.	Magnesium oxide.
Polarine oil.	Sodium bicarbonate.
Cylinder oil.	Sodium thosulfate.
Castor oil.	Sodium borate.
Gum copal.	Sodium carbonate.
Resorcine white crystal.	Sodium phosphate.
Graphite.	Ether.
Glass wool.	Iodine.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, New Albion Building, Boston, Mass., Thursday, Aug. 27, 1914, at 2.45 P.M., and affirms and adopts the findings and decision of the committee of arbitration.

It was claimed by the attorney for the dependents that the employee, John T. Murphy, died on March 2, 1914, as the result of a personal injury arising out of and in the course of his employment, by reason of poisoning by the fumes of the chemicals used in the experiments undertaken at his place of employment.

It was shown that the employee had been in good health prior to his death, and that he had been engaged to perform carpenter work and help his employers to perfect a certain moving-picture film. Certain chemicals were used in preparing

this film, the testimony showing, however, that these were not dangerous, nor was there any risk of suffocation or poisoning from their use or contact with them. The employee had assisted in making repairs on the tank into which the preparation of chemicals was placed, being inside about ten or fifteen minutes on each occasion.

The employee remained at the factory on Saturday, March 1, 1914, at which time work was temporarily discontinued, to perform certain duties assigned to him. He was instructed to sweep up a pile of dirt which was on the floor and to then go home, returning when it was necessary to care for the furnace. The employee remained at his place of employment all day Saturday and during the night, and was found by his superior, Mr. Hannigan, Sunday morning when the latter went to the factory on an errand. At about 10 o'clock Hannigan heard Murphy at the furnace, and later went down to see him. The dirt pile had not been swept up, but the furnace was full of coal, and Murphy had the appearance of a man who had fallen into the coal bin. He perspired freely and acted like a man who had been drinking, although Hannigan afterwards stated that he did not think he had. Hannigan afterwards set Murphy in a wheelbarrow and left him. Later, hearing moans, he returned and found the employee frothing at the mouth and stiffening up on one side. He called Dr. McCausland at about 11.20 o'clock, and the doctor called the ambulance shortly after his arrival. He was taken to the Quincy Hospital and died in a short time.

The evidence fails to reveal the cause of the death of the employee, the medical testimony showing that while the physicians were at first of the opinion that he died of apoplexy, they later expressed the opinion, in view of the report of Medical Examiner George S. Magrath, that apoplexy was not the cause. They could not state what was the cause of death. The medical examiner stated that death was not due to any organic trouble. The employee did not die of apoplexy or any organic disease of the heart, lungs or brain. He could not determine whether or not death had come from suffocation, and found nothing to indicate tonsilitis and no evidence of diabetes. He could not say, as a result of his examination, what the cause

of death was. It was possible for poisonous fumes to be inhaled and cause death without making a change in the body. He eliminated asphyxia as a cause of death. Referring to the symptoms shown when the employee was first seen by Dr. McCausland, he said he could not account for them. It is a very rare thing for epilepsy to cause death. When death does occur incidental to an epileptic seizure it is usually because asphyxiation, due to vomiting, shuts off the supply of air into the lungs and causes asphyxia. He excluded asphyxia as a cause, however. Neither Dr. McCausland nor Dr. Fred E. Jones could give a cause for the death of the employee.

The evidence leaves the matter of the cause of the death of the employee in doubt, removes apoplexy or other organic diseases as its probable cause, shows that the employee did not die of asphyxia, and does not sustain the claim of the dependents that it arose out of and in the course of the employment by reason of poisoning from the chemicals which were used in the manufacture of moving-picture film material. The Board therefore finds that the weight of the evidence does not show that the employee received a personal injury arising out of and in the course of his employment.

JAMES B. CARROLL.
DAVID T. DICKINSON.
JOSEPH A. PARKS.

CASE No. 750.

GEORGE DOHERTY, *Employee*.

WELLINGTON-WILD COAL COMPANY, *Employer*.

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., *Insurer*.

FROSTBITE RESULTING FROM THE MATERIALLY INCREASED EXPOSURE TO WHICH THE EMPLOYEE WAS SUBJECTED BY REASON OF THE NATURE OF HIS EMPLOYMENT IS A PERSONAL INJURY. CASE APPEALED TO SUPREME JUDICIAL COURT.

The employee was obliged to work outdoors in a coal yard shoveling coal into wagons for delivery on a very cold day when the temperature ranged from 0 to 6° below. He wore buckskin gloves with a cloth lining. The employee noticed a

numbness in one or more of his fingers during the forenoon, and also later in the day, and found on getting home at night that the middle long finger of each hand was badly frozen and some of the other fingers nipped to a lesser degree. As a result thereof both of said long fingers had to be amputated. The evidence showed that the employee was exposed by reason of his work and duties to a materially greater danger and likelihood of getting frozen than the ordinary person or outdoor worker on that day.

Held, that frostbite which occurs by reason of materially increased exposure is a personal injury arising out of and in the course of the employment.

Review before the Industrial Accident Board.

Decision.—The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to the Supreme Judicial Court.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of George Doherty *v.* Employers' Liability Assurance Corporation, Ltd., this being case No. 750 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of David T. Dickinson of the Industrial Accident Board, chairman, Daniel A. Canney for the employee, and John G. Brackett, Esq., for the insurer, being duly sworn, heard the parties and their witnesses in the Hearing Room of the Industrial Accident Board, New Albion Building, Boston, Mass., on Tuesday, March 10, 1914, at 2 P.M.

This employee on Jan. 13, 1914, received an injury in the course of his employment. The only question before the committee was whether the injury arose out of his employment. His work was that of a coal shoveler at the yard of his employer, the Wellington-Wild Coal Company, Charlestown, Mass., who were dealers in coal and fuel. His average weekly wages were \$14.

The day of the injury was one of the coldest throughout New England and a large part of the country for years. The temperature in Boston did not rise above 0, and ranged from 0 to 6° below.

The employee was obliged in the course of his duties to work outdoors in a coal yard shoveling coal into wagons for delivery on that day, with the exception of the noon hour, from 7 A.M. to 7 P.M. He wore buckskin gloves with a cloth

lining. He noticed a numbness in one or more of his fingers during the forenoon, and also later in the day, and found on getting home at night that the middle long finger of each hand was badly frozen and some of the other fingers were nipped to a lesser degree. He received hospital treatment, and the upper portion of the phalanges of both said long fingers had to be amputated. At the time of the hearing the fingers were in bandages and he was wholly incapacitated for work.

It was contended by the insurer that this injury did not arise out of the employment, but was due to a widespread weather change, with a drop in the temperature affecting most of the community alike, and especially outdoor workers or persons who had occasion to be outdoors. It was contended that the employee was not exposed to this severe cold and the danger of freezing to a materially greater degree than other outdoor workers, such as teamsters and laborers.

Evidence was also introduced by the insurer to the effect that only one other employee of this employer had received an injury from freezing on that day, and a foreman testified that for twenty-six years he did not recollect of any other employee of the concern having received an injury from freezing. It appeared that the coal yard itself was not exposed to cold materially more than other outdoor places on this day.

The committee finds that the employee was exposed by reason of his work and duties to a materially greater danger and likelihood of getting frozen than the ordinary person or outdoor worker on that day. The practically constant gripping of the shovel by both hands, made necessary by the lifting and throwing of the coal, naturally retarded the circulation of the blood in the hands and rendered them specially liable to injury by freezing, more than in a case where the hands would not be thus cramped for long-continued periods, or where the progress of the work allowed intervals for relaxation and relief.

In addition to this the urgent need of fuel on this extremely cold day by persons in the community who happened to be without it made it specially necessary for a person in the employee's particular occupation to stick to his post of duty in spite of the freezing cold, and, in fact, because of it. The fact that the employee was frozen in no other place than his hands,

and in both hands, indicates that its cause was specially connected with his work of shoveling, and that the danger was increased thereby, more than would be the case in ordinary outdoor occupations. It would seem that an employment which made it necessary, in a special degree, for an employee to work under conditions of extreme cold, and continuously, to fill orders for fuel that were needed by the public, justified him in saying that such an injury as this arose out of his employment.

The committee finds that he received this injury both in the course of and arising out of his employment, and that he is as a result thereof still wholly incapacitated for work; that he is entitled to a compensation of \$7 from Jan. 27, 1914, the fifteenth day after the injury, to the date of the hearing, and during the further continuance of such total disability.

This decision and all findings regarding compensation or the existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III. of the Workmen's Compensation Act, and the general provisions of said act and its amendments.

DAVID T. DICKINSON.
DANIEL A. CANNEY.

John G. Brackett dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, New Albion Building, Thursday, May 21, 1914, at 10.15 A.M., and affirms and adopts the findings and decision of the committee of arbitration.

George Doherty, the employee, a coal shoveler, received a personal injury arising out of and in the course of his employment, by reason of exposure to very severe cold weather, which ranged in temperature from 0 to 6° below 0. As a result of this exposure the middle finger of each hand was frozen so badly that amputation became necessary, and some of the

other fingers of said hands were frostbitten to a lesser degree, the said employee being totally incapacitated for work at the time of the hearing before the committee of arbitration, said total incapacity continuing.

The day upon which the said personal injury occurred, to wit, Jan. 13, 1914, was one of the coldest throughout New England in many years, and the said employee was obliged, in the course of his employment, to work outdoors in a coal yard shoveling coal into wagons for delivery all that day, from 7 o'clock in the morning until the same hour in the evening, with the exception of an hour at noon for lunch. He wore, as a protection against the exposure occasioned by his employment, a pair of buckskin gloves with a cloth lining.

It has been held in England in two instances, in the case of the driver of a baker's cart and in the case of a sailor, that injuries occasioned by frostbite were not covered by the statute. The court held that the injuries did not arise out of the employment; that frostbite did not occur by reason of any special exposure or special danger to which the employee was subjected; that the liability to frostbite was common to all humanity and did not occur because of the employment. (*Warner v. Couchman*, 4 B. W. C. C. 32 C. A. (1910), 5 B. W. C. C. 177 H. L. (1911); *Karemaker v. SS. Corsican*, 4 B. W. C. C. 295 C. A. (1911)).

The Board is of the opinion that it should not follow these decisions. The employee in this case was obliged to be in the open air, exposed to the severe weather, and was required by the nature of his employment to continue working during the forenoon and the afternoon with his hands exposed, except for the gloves which he wore; and he was obliged to continue in such a manner that it is fair to say that the injury was caused by his employment. As long as he worked the danger was present; and taking into account the purposes and the meaning of the Workmen's Compensation Act, it seems fair to say that under the peculiar circumstances of this case the injury is traceable to the employment, and did, in fact, occur as a result of the materially increased exposure to which the employee was subjected by reason of the nature of said employment.

The Board therefore finds, upon all the evidence, that George Doherty, the employee, was exposed to a special risk by his employment, and received a personal injury arising out of and in the course of his employment on Jan. 13, 1914; that he was totally incapacitated for work by reason of said injury to March 10, 1914, said total incapacity continuing; that he is entitled to a weekly payment of \$7 during the continuance of said total incapacity, dating from Jan. 27, 1914, the fifteenth day after the injury; and that there is due, to said March 10, 1914, the sum of \$42.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 754.

GEORGE A. ROSS, FATHER AND DEPENDENT OF ELLA F. ROSS,
Employee.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, *Employer.*

CASUALTY COMPANY OF AMERICA, *Insurer.*

FATAL INJURY TO EMPLOYEE IN THE COURSE OF HER DELIVERY OF CHRISTMAS GIFTS IN THE BUILDING IN WHICH SHE WAS EMPLOYED DOES NOT ARISE OUT OF HER EMPLOYMENT.

The evidence showed that the employee, a clerk, received an injury which resulted fatally, in the building in which the office of the subscriber was located. She left her place of employment at lunch time, fully clothed for the street, and while attempting to get off the elevator at the ninth floor received the injury which caused her death. The employee was on the way to the office of a friend on that floor for the purpose of making a personal delivery of a Christmas gift, this errand having no connection with her employment.

Held, that the injury did not arise out of the employment.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of George A. Ross,

father and dependent of Ella F. Ross, v. Casualty Company of America, this being case No. 754 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of Joseph A. Parks, representing the Industrial Accident Board, chairman, Robert W. Thorson, representing the dependent, and Atherton N. Hunt, Esq., representing the insurer, heard the parties and their witnesses at the Hearing Room, New Albion Building, Boston, Mass., Friday, March 20, 1914, at 2 P.M.

The insurer contested the payment of compensation to the dependent father, George A. Ross, on the ground that the injury did not arise out of and in the course of the employment of the deceased Ella F. Ross. On the other hand, the dependent, through his attorney, claimed that the insurer was liable under the act, and a claim for double compensation was filed because of the alleged serious and willful misconduct of Gilman E. Bell, a person regularly intrusted with and exercising the powers of superintendence.

In accordance with the requirements of the act the arbitrator named by the insurer was approved by the subscriber.

The evidence before the committee showed that Ella F. Ross, the employee, received an injury which resulted fatally at about 2.30 o'clock in the afternoon of Dec. 23, 1913, in the John Hancock Building on Devonshire Street, Boston, Mass. She was employed as a clerk by the John Hancock Mutual Life Insurance Company, and left her place of employment at about the hour named, this being her regular lunch time, fully clothed for the street, and while attempting to get off the elevator at the ninth floor received the injury which caused her death. The evidence showed that when the elevator left the tenth floor there were nine passengers, — six women and three men. As it slowed up on the way down from the tenth floor to the ninth, the said employee was heard to say, "Ninth floor, please." There was a difference of opinion between the witnesses as to whether it was said in a loud or conversational tone.

Gertrude Lockwood, another employee of the subscriber, boarded the elevator with Miss Ross at the tenth floor. She stated that it was Miss Ross' regular lunch hour and that she had her hat and coat on. Miss Ross informed her that she

intended to get off at the ninth floor to deliver a Christmas gift to a friend. She heard Miss Ross say distinctly, "Ninth floor, please," and that it was loud enough to be heard by the elevator operator, but she could not say whether he heard it or not.

Mildred Bennett, another employee, stated that she rode on the elevator with Miss Ross, and that the latter had her hat and coat on, and that it was her regular lunch hour. She heard Miss Ross say she was going to get off at the ninth floor to deliver a Christmas gift. She also heard her say to the elevator operator, "Ninth floor, please."

Lillian C. Murray, a third employee, testified that she was in the elevator at the time of the accident, that Miss Ross had her hat and coat on, and that it was the latter's usual lunch hour. She heard Miss Ross say, "Ninth floor, please," but did not know of her own knowledge that the deceased was going to get off and deliver a Christmas present. She learned that afterwards.

Agnes E. Hill, who worked with the deceased for the John Hancock Mutual Life Insurance Company, was a passenger on the elevator at the time of the injury. She stated that it was Miss Ross' usual lunch hour and that she had her hat and coat on. She knew that Miss Ross intended to deliver a Christmas present on the ninth floor, and heard her say to the elevator operator, "Ninth floor, please."

Fanny S. Briggs, another employee, testified that she got on the elevator when it stopped at the ninth floor. She did not see the deceased until the elevator had started, and then saw the body between the gate and the wall.

James Stackhouse, the superintendent of elevators, stated that several packages were found in the bottom of the car that "didn't belong to anybody but her."

The evidence shows and the committee finds that the employee had finished her work for the time being and had entered the elevator for the purpose of making a personal delivery of a Christmas present to a friend in the John Hancock Building, this errand having no connection with her employment, and the resulting injury and fatal termination thereof not arising out of and in the course of her employment. She was dressed in

clothing suitable for street wear, and it was evidently her intention, after having made the delivery of the gift, to leave the building for the purpose of partaking of lunch, in accordance with her usual custom at this time of the day. The injury not arising out of and in the course of the employment, the claim for compensation of the dependent father, George A. Ross, is therefore dismissed.

JOSEPH A. PARKS.
ATHERTON N. HUNT.
ROBERT W. THORSON.

CASE No. 768.

WILLIAM A. GERTZ, *Employee*.
STEARNS & MCKAY, *Employer*.
ROYAL INDEMNITY COMPANY, *Insurer*.

BOARD RULES THAT IT HAS AUTHORITY TO REVIEW AGREEMENT ENTERED INTO BETWEEN THE PARTIES. AGREEMENT CANCELLED BECAUSE IT WAS BASED UPON THE ERRONEOUS ASSUMPTION THAT THE EMPLOYEE'S LOSS OF VISION WAS DUE TO THE INJURY.

The question in dispute was whether the insurer was entitled to apply for authority to terminate the payment of the additional compensation provided by the statute for the reduction of vision in either eye to one-tenth of normal with glasses, when the evidence showed that the reduction was not due to a personal injury arising out of and in the course of the employment. The parties came to an agreement upon the assumption that the injury did in fact cause the reduction in vision and said agreement was duly approved by the Industrial Accident Board.

Held, that the insurer is precluded by the terms of its agreement from ending the payment of compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board, revising the findings and decision of the committee of arbitration, rules that it has authority to review the agreement, and cancels same.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of William A. Gertz v. Royal Indemnity Company, this being case No. 768

on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of David T. Dickinson of the Industrial Accident Board, chairman, John M. Cashman, representing the employee, and George H. McDermott, representing the insurer, after being duly sworn, heard the parties and their witnesses at the Board Room of the Industrial Accident Board, Monday, April 13, 1914, at 2 P.M., and continued Tuesday, April 14, 1914, at 9 A.M.

This employee on Sept. 23, 1913, received an injury arising out of and in the course of his employment while engaged in his work as a foreman-painter. An agreement for compensation was made by the parties and approved by the Board on Feb. 5, 1914, a copy of which is hereto annexed. Compensation at the rate of \$9 per week for reduction of vision was paid by the insurer, in accordance with this agreement, for a period of nineteen weeks, when it was stopped by the insurer on Jan. 29, 1914.

The employee's average weekly wages were \$18. The question raised at the hearing was whether the reduction of the vision of his right eye to one-tenth of normal with glasses was the result of the injury or due to natural causes. He had continued to work for the employer since the injury at the same wages, and was continuing to do so at the time of the hearing.

At the time of the injury he was removing paint from the bottom of a boat with a fluid known as Bull Dog Paint and Varnish Remover. The bottom of the boat was about 2 feet above the ground. He was lying on his back under the boat looking upward, when about one-half a tablespoonful of the Bull Dog Paint Remover, somewhat mixed with the paint from the boat, dropped from the brush into his right eye. The remover contained some chemicals, as did also the paint on the boat, but not stringent enough to eat through the tissues of the eye. Any injury to the tissues of the eye was very slight and superficial, and such traces, if any, were *nebulæ*. The eye smarted badly, and the employee immediately went to the pump and washed it out with water, and later bathed it with witch-hazel for a few days. The ball of the eye became

red and bloodshot, which lasted about four days, when it cleared up and became normal in its appearance.

The employee testified that "this was in the afternoon, and my eye was running water. I did not continue to do my regular work. I did sandpapering. I didn't do my regular work because I couldn't lie under the boat to finish it: my eye would keep filling up with water. Standing up I could keep the cloth up to my eye and wash it. My eye felt just as if there was something in it and has felt that way ever since."

He testified that he had never noticed any trouble with his eye before this accident; that formerly, in the year 1898, he was qualified as a marksman with the use of this right eye while a member of the militia. A part of his work consisted in lettering the names on boats, which he did with paint or gold letters, drawing the designs therefor and painting or gilding them afterwards. He had never had any trouble in doing this lettering until two months after the accident, when he noticed that he could not see with the right eye properly to draw the lines and letters.

He testified that "about two months after the accident I was sitting in my kitchen about 8 o'clock in the evening. I was looking up the dates on a calendar on the wall for a date in connection with a time that was coming off of the society. I put my hand over my left eye and I couldn't see the calendar. That was the first time I discovered I couldn't see that calendar."

About two days after this he went to Dr. Henry G. Carroll for treatment, who found that a cataract was developing in the right eye. His vision has since become reduced to below one-tenth normal with glasses on account of the cataractous condition.

Dr. William J. Daly, who was appointed an impartial physician by the Board, reported and personally testified as follows:—

In the case of William A. Gertz of 68 Front Street, Marblehead, kindly referred by you to me as the impartial physician under section 8, Part III., of the act, I find the following:—

Mr. Gertz shows atypical cataractous changes in the lens of his right eye. There are, further, minute corneal scars and possible disorganization of the globe contents behind the cataractous lens. His vision in that eye

is but the perception of light, and that he projects falsely. It is therefore, of course, under one-tenth of normal, and glasses do not help.

I can find no causal connection between his accident of Sept. 23, 1913, and the present condition in his right eye. I think it possible that an accident at some time may have produced this condition, but the accident he describes could not possibly have done so.

The stuff he was using (Bull Dog Paint Remover) fell from his brush into his eye, a distance of 2 feet. The amount was a half tablespoonful and may have been a little more. He states that the resulting redness of the eye was all gone in four days. He first noticed his blindness accidentally two months after.

I can find causal connection by neither mechanical, inflammatory, chemical, bacterial nor toxic process between his accident and the objective condition.

WM. J. DALY.

Drs. Walter B. Lancaster and Alman G. Morse, oculists called by the insurer, testified substantially as Dr. Daly.

Dr. Henry G. Carroll, a general practitioner called by the employee, testified in substance that the chemical action of the fluid which fell into the claimant's eye had not caused the cataract because the condition of the eye did not indicate that the chemical had eaten through the tissues so as to reach the lens by chemical action.

He testified that, in his opinion, the weight of a half tablespoonful of the fluid falling a distance of about 18 inches into the employee's eye might have been sufficient, from the effect of its blow or concussion, to have hastened or accelerated the coming of a cataract, if a latent cataractous condition had existed in the eye prior to the accident; but that the effect of such a slight blow would probably not have been sufficient to have caused the cataractous condition in the eye, if it had not existed before such accident.

Drs. Daly, Lancaster and Morse testified that, in their opinion, the impact of the weight of the liquid would not have been sufficient either to have originally caused the cataract or to have hastened or accelerated a pre-existing latent one. Dr. Lancaster testified that, in his opinion, it was possible that the inflammation in the eye resulting from the chemical action did hasten a pre-existing latent cataract in the eye, but that, in his opinion, it was not probable; he based this opinion on the fact that irri-

tants were frequently used in order to cure or alleviate a cataractous condition by increasing the circulation, and that they did not in his experience result in aggravating cataractous conditions. In the opinion of all the physicians a cataractous condition of the eye, though latent and not noticed by the employee, existed before the injury.

The committee finds that the cataract was not caused by the injury; that a cataract did exist in an incipient condition in the employee's eye before the injury; and that on the weight of the evidence it was not hastened or accelerated thereby. The main consideration in favor of the employee was that he testified he had never noticed any impairment of the vision of this eye before the injury, and began to notice an impairment in about two weeks thereafter. Its weight, however, seems to be overborne by the other evidence and testimony in the case, so that the committee finds as above stated. The committee, however, rules that the insurer is precluded by the terms of its compensation agreement with the employee from raising this issue now, and that there is due to the employee thirty-one weeks' compensation at the rate of \$9 per week, being the balance of the period of fifty weeks, after the nineteen weeks already paid by the insurer.

A copy of this agreement regarding compensation is hereto annexed.

DAVID T. DICKINSON.

John M. Cashman, arbitrator representing the employee, agrees with the finding submitted, in so far as it relates to the insurer being precluded by its compensation agreement from raising this issue at the present time, and as to the amount due to the employee.

George H. McDermott, arbitrator representing the insurer, dissents and finds that the insurer should not be precluded from refusing to continue payments after discovery of the mistake under which the agreement was made.

WORKMEN'S COMPENSATION ACT,
INDUSTRIAL ACCIDENT BOARD,
BOSTON, MASS.

Every agreement in regard to compensation under this act is subject to approval by the Industrial Accident Board, and a memorandum of the same must be filed with the Board, whether said agreement is written or oral, and whether it is made by one or both parties, or in the form of a receipt. Any weekly payments or settlement under the act, whether purporting to be final or otherwise, may be reviewed by the Board. (Section 20, Part II., and sections 4 and 12, Part III., chapter 751 of the Acts of 1911, and amendments thereto, and Rule No. 6 adopted by the Board.)

WILLIAM A. GERTZ, *Employee.*
ROYAL INDEMNITY COMPANY, *Insurer.*
AGREEMENT IN REGARD TO COMPENSATION.

We, William A. Gertz, residing at city or town of
Name of injured employee.
68 Front Street, Marblehead, Mass., and the
Royal Indemnity Co., 85 Water Street, Boston, Mass.,
Name and address of insurance association or company.
have reached an agreement in regard to compensation for the injury
sustained by said employee while in the employ of
Stearns & McKay, 89 Front Street, Marblehead, Mass.
Here insert name and address of employer.

Here insert the time, including hour and date of accident, the place where it occurred, the nature and cause of injury, and other cause or ground of claim.

Injury occurred: 9—23—13.
Compensation began: 9—23—13.
Disability ended: No lost time.
Injured lost no time.

Compensation to be paid in the sum of \$9 for a period of fifty weeks for reduction of vision in the right eye to less than one-tenth of normal. (Massachusetts Compensation Act, Part II., section 11(b).)

The terms of the agreement follow:
Here state the sum per week agreed upon, subject to the terms of the act.

Average weekly wages, \$18.
Amount agreed upon, \$9.
Total paid employee
Hospital and medical services

B. WILLIAMSON
Witness.
85 Water Street, Boston, Mass.
City or town, street and number.

WM. A. GERTZ
Name of injured employee.
ROYAL INDEMNITY CO.
Name of insurance association or company.
H. E. DUNKLE, *Chief Adjuster.*

Approved Feb. 5, 1914, subject to the provisions of the Workmen's Compensation Act.
INDUSTRIAL ACCIDENT BOARD, ROBERT E. GRANDFIELD, *Secretary.*

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, New Albion Building, Boston, Mass., Wednesday, June 10, 1914, at 2.45 P.M., and, revising the decision of the committee of arbitration, finds and decides as follows: —

The question in dispute was whether the insurer was entitled to apply for authority to terminate the payment of the additional compensation provided by the statute for the reduction of the vision in either eye to one-tenth normal when the evidence showed that the reduction of vision was not due to a personal injury arising out of and in the course of the employment.

The parties had come to an agreement upon the assumption that the injury received by the employee did, in fact, cause the reduction in vision, and said agreement had been duly approved by the Industrial Accident Board, the usual form of approval having been indorsed on said agreement, to wit: "Approved Feb. 5, 1914, subject to the provisions of the Workmen's Compensation Act, Industrial Accident Board, Robert E. Grandfield, Secretary."

The evidence is substantially reported by the committee of arbitration, and shows that the cataractous condition of the eye, which caused the reduction in vision, was in existence prior to the time of the injury. The committee of arbitration ruled, however, that the insurer was "precluded by the terms of its compensation agreement from raising this issue," and awarded compensation to the employee in accordance with said agreement.

The Industrial Accident Board rules that it has authority to review the agreement entered into between the parties (Part III., section 12), providing that "any weekly payment under this act" may be so reviewed, and "on such review it may be ended, diminished or increased . . . if the board finds that the condition of the employee warrants such action."

The Board therefore finds, upon all the evidence, that the

weekly payments under the agreement above referred to should end, and hereby revokes its approval of said agreement, canceling same on its records.

JAMES B. CARROLL.

DUDLEY M. HOLMAN.

EDW. F. MCSWEENEY.

CASE No. 772.

JOHN OLLIE, *Employee*.

HUNT RANKIN LEATHER COMPANY, *Employer*.

TRAVELERS INSURANCE COMPANY, *Insurer*.

REFUSAL TO UNDERGO OPERATION UNREASONABLE AND FURTHER COMPENSATION NOT DUE.

The employee, a native of Turkey, objected and refused to undergo an operation because he would be distressed at the appearance of his hand with the finger removed, as would also his family and countrymen when he returned home. The medical testimony showed that if a simple operation were performed he would be recovered therefrom and able to resume his regular work in six weeks thereafter.

Held, that the employee's refusal to undergo the operation is unreasonable, and that his compensation for total or partial incapacity should terminate at the end of six weeks from date of hearing.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of John Ollie v. Travelers Insurance Company, this being case No. 772 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of David T. Dickinson of the Industrial Accident Board, chairman, Osmond Hassan of Peabody, representing the employee, and Thomas S. Sullivan, Esq., of Salem, Mass., representing the insurer, heard the parties and their witnesses in the Selectmen's Room, Town Hall, Peabody, Mass., on Wednesday, April 15, 1914, at 10.30 A.M.

The committee finds that this employee received an injury arising out of and in the course of his employment on Nov. 24, 1913, by reason of the index finger on his left hand being lacerated and somewhat crushed in a machine roller at the factory of

the said employer. His average weekly wages were \$7. As a result of the injury said finger has been rendered stiff and permanently incapable of use, and the committee finds on the testimony of Dr. S. Chase Tucker, and on its observation of the finger, that a simple surgical operation would remedy his present partial incapacity for work, due to the interference of the stiff finger with the motions of the hand. This fact was brought to the employee's attention by the secretary of the Board on Feb. 26, 1914, also by his physician, said Dr. Tucker, and by his friends. The employee is a native of Turkey and about forty-five years of age, and objected and refused to undergo the operation because he would be distressed at the appearance of his hand with the finger removed, as would also his family and countrymen when he returned home. The medical testimony showed that if an operation were performed he would be recovered therefrom and able to resume his regular work in six weeks thereafter.

The committee finds that his refusal to undergo the operation is unreasonable, and that his compensation for total or partial incapacity should terminate at the end of six weeks from April 15, 1914, the date of the hearing, and that he is entitled to the following compensation: seven weeks from Feb. 24, 1914, to April 15, 1914, at \$4 a week, \$28; twelve weeks' additional compensation at \$4 a week, for the permanent loss of finger, \$48; six weeks from April 15, 1914, to May 27, 1914, \$24; aggregating \$100.

DAVID T. DICKINSON.

THOMAS S. SULLIVAN.

CASE No. 774.

WILLIAM E. GRADY, *Employee.*

F. S. PERKINS COMPANY, *Employer.*

FIDELITY AND DEPOSIT COMPANY, OF MARYLAND, *Insurer.*

EMPLOYEE NOT ENTITLED TO COMPENSATION ON ACCOUNT OF POSSIBLE REDUCTION IN EARNING CAPACITY. COMPENSATION PAYMENTS ARE DUE ONLY WHEN THE EMPLOYEE EARNS A LOWER AVERAGE WEEKLY WAGE THAN THAT RECEIVED BY HIM BEFORE THE INJURY.

The evidence showed that the employee, manager for the subscriber, received a personal injury arising out of and in the course of his employment, by reason of a cut by a circular saw which necessitated the amputation of the forefinger and caused material damage to the second finger of the right hand. The employee claimed that his earning capacity had been lessened by reason of the injury, stating that whereas he was able to earn \$27 weekly before said injury, he was able to earn only \$13.50 weekly afterward. The record of the meeting of the corporation by which he was employed showed that by vote of said corporation at its annual meeting, seven months after the injury, the employee's wages were fixed at \$27 for the ensuing year. Despite this vote it was claimed that the earning capacity of the employee was only \$13.50 weekly.

Held, that the employee was not entitled to compensation.

Review before the Industrial Accident Board.

Decision.—The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of William E. Grady *v.* Fidelity and Deposit Company of Maryland, this being case No. 774 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of Edward F. McSweeney of the Industrial Accident Board, chairman, Mr. A. M. Goldsmith of Park Road, Winchester, representing the insurer, and Mr. William A. Driscoll of 5 Merrimac Street, Lowell, Mass., representing the employee, heard the parties and their witnesses at the Aldermanic Chamber of the Lowell City Hall, Friday, May 15, 1914, at 2 P.M. Appearances: Albin L. Richards, Esq., for insurer; employee, unrepresented.

The facts in this case appear to be as follows:—

On July 15, 1913, the Industrial Accident Board received a report signed by Josephine Boyle, bookkeeper, that William E. Grady, sixty years of age, employed as a manager at an average weekly wage of \$27 by the F. S. Perkins Company, at their machine shop in Lowell, was injured on Saturday, July 12, 1913, by being caught with a circular saw which injured the first two fingers of his right hand. The forefinger and middle finger were badly cut, making amputation of the forefinger necessary, and materially injuring the second finger. Said F. S. Perkins Company are insured with the Fidelity and Deposit Company of Maryland.

It appears that the insurer accepted liability in connection with Grady's injury, and paid compensation for disability at the rate of \$10 a week, the maximum amount allowed under the law, up to Dec. 1, 1913, and partial disability, at the rate of \$6.75 a week, based upon the difference between his average weekly wages at the time of the injury and his earnings at that time, from Dec. 1, 1913, to April 4, 1914.

Albin L. Richards, Esq., representing the insurer, stopped compensation on April 4, 1914, on the ground that Grady was not an employee under the act.

W. Bateson Redhead of 16 A Street, Lowell, testified he was a machinist for the F. S. Perkins Company, and had been working for this concern seven or eight years. He had nothing to do with the books and knew nothing about the payments of the company. He knew that two of the shareholders of the company were Mr. Grady and Mr. Woodworth. He saw Mr. Grady about five minutes after the accident. In Mr. Grady's absence he took charge of the shop. Mr. Grady did not return to work for about three months after the injury, then would make an occasional call, and go home, not remaining about the factory for any length of time.

He could not state when Mr. Grady started to work steadily after the injury, but he knew that from April 4, 1914, he was in all the time. Lathe work was not in Grady's usual line of work, but he did it occasionally. The regular line of work was pattern making, carpenter work and blacksmithing. Since the injury he worked on lathes and attended to duties as manager

of the company; did no blacksmithing, but had done a little carpenter work. Mr. Grady talked to customers, made prices, etc.

In answer to questions by Mr. Grady, Mr. Redhead replied that Mr. Grady did not do any blacksmithing because he could not very well do so. Since the injury Grady did no splitting, putting in keys, and but little woodwork. At the time of the accident he was making pattern back rest for the American Hide and Leather Company.

Charles N. Williams of Lowell testified that he held no office in the F. S. Perkins Company. The records of the F. S. Perkins Company were put in his bank for safekeeping, and in this way he came into the possession of them. He owned a few shares in the F. S. Perkins Company. Other shareholders were Mr. Woodworth, Mr. Carey, Mrs. Perkins and the estate of William Smith and Mrs. William E. Grady. He thought the capital stock of the company was \$12,000. The Board of Directors had voted a salary of \$27 a week to Mr. Grady. This Board consisted of Mr. Woodworth and Mr. and Mrs. Grady.

Artemus B. Woodworth of Lowell, director of the F. S. Perkins Company, testified that at the time the vote was passed, on February 5, the directors knew that Mr. Grady had met with this accident. He did not think the payment of this money was discussed at the meeting. He considered Grady had authority to decide what his own compensation should be up to \$27 a week, that was voted him. Grady worked for Perkins prior to his death. Grady now conducted all correspondence, fixed prices, supervised and employed the help, etc. He did not know whether a record was kept of the amount of money drawn by Mr. Grady since the injury; thought dividends of 5 per cent. had been paid yearly by the F. S. Perkins Company.

William E. Grady, the injured man, testified that he had been voted a weekly salary of \$27 at the annual meeting of Feb. 5, 1914; could not tell how much he had drawn from this concern since the injury. He read the following from the records of the company:—

Voted, That Mr. Grady be paid for his services as treasurer and manager of the F. S. Perkins Company, \$27 a week.

The 120 shares of stock in the F. S. Perkins Company were valued at \$100 each, of which Grady owned 55 and his wife 10 shares. He couldn't tell how much he had drawn from the concern since the injury, but did not intend to draw the full amount of \$27 voted as his salary by the corporation and release the corporation from all claim. The first three years no dividends were paid, but since that time dividends were paid at the rate of 5 per cent., and some part of the deferred dividends for the first three years had been subsequently paid up.

The arbitrators find, on the weight of the evidence, that Grady and his wife owned 65-120 of the capital stock of the company; both were members of the Board of Directors, and he was manager and superintendent, and acted in direct control. It also appeared that he did do certain work around the factory prior to the injury; he made patterns, gave orders, disposed of and bought stock, etc.

The arbitrators find that, as a result of the injury of July 12, 1913, Grady was disabled for work until Dec. 1, 1913, and that partial disability existed from that time.

Miss May E. P. Lowney, inspector for the Industrial Accident Board, made an inspection of the F. S. Perkins Company's books, and stated that the books showed Grady receiving no pay from the time of the injury up to Dec. 1, 1913, and at the rate of \$13.50 from said date of Dec. 1, 1913, up to the date of the hearing.

On the evidence the arbitrators find, as a fact, that Grady is an employee, as contemplated by section 2, Part V., of the act, and as such employee, insured by the F. S. Perkins Company under the act, is entitled to the compensation provided by law for injured employees.

The arbitrators find, on the evidence, that total disability existed from the date of the injury of July 12, 1913, until Grady returned to work at a weekly wage of \$13.50, on Dec. 1, 1913, when total disability ceased. Grady was paid by the F. S. Perkins Company, after Dec. 1, 1913, until the date of hearing, \$13.50 a week, this being one-half of the average weekly wage received before the injury, the decrease in wages being alleged to have been due to Grady's decreased earning power, a result of the injury of July 12, 1913.

The arbitrators find that the Board of Directors of the F. S. Perkins Company, on Feb. 5, 1914, voted that Grady be paid for his services \$27 a week, and in consequence of this vote, Grady's wage being set at the same rate it was on July 12, 1913, the day of the injury, there was, in fact, no difference between the average weekly wage before the injury and the average weekly wage he was able to earn after Feb. 5, 1914, as contemplated by section 10 of Part II., and in consequence the Fidelity and Deposit Company is not obligated to pay compensation for partial disability after Feb. 5, 1914.

EDW. F. MCSWEENEY.

A. M. GOLDSMITH.

William A. Driscoll dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, New Albion Building, Boston, Mass., on Wednesday, June 24, 1914, at 2.45 P.M., and affirms and adopts the findings and decision of the committee of arbitration.

The facts are fully set forth in the report of the committee of arbitration. Briefly, the evidence shows that William E. Grady, the employee, manager of the F. S. Perkins Company, received a personal injury arising out of and in the course of his employment on Saturday, July 12, 1913, by reason of a cut by a circular saw, which necessitated the amputation of the forefinger and caused material damage to the second finger of the right hand. Compensation was paid by the insurer, in accordance with the requirements of the statute, until April 4, 1914, when the insurer suspended payments on the ground that the said Grady was not an employee within the meaning of the word as defined in said statute. The committee found and the Board affirms the finding that the said Grady is an employee, said Grady being a "person in the service of another" under an express contract of hire, his employment not being casual, and said employment being in the usual course of the business of the subscriber, a duly organized corporation.

The said employee claims that his earning capacity has been lessened by reason of the injury, claiming that whereas he was able to earn \$27 weekly before said injury he is now able to earn only \$13.50 weekly. This claim is based upon the loss of the forefinger and the material injury to the second finger, by reason of which he is not now able to perform certain manual labor that he was formerly able to undertake. The evidence also shows that the corporation at its annual meeting on Feb. 5, 1914, voted "that Mr. Grady be paid for his services, as treasurer and manager of the F. S. Perkins Company, \$27 a week." The corporation is capitalized at \$12,000, in 120 shares of the par value of \$100 each, the majority holdings being in the hands of the employee, Grady, and his wife, the former owning 55 shares and the latter 10. The employee states that he has only been drawing \$13.50 weekly from the company since that time, although no action has been taken by the corporation to rescind its vote. He claims compensation under Part II., section 10, on the basis of an earning capacity of \$13.50 weekly. His ability as manager and treasurer of the corporation has not been lessened by the injury. The Board finds upon this evidence that the average weekly wages which the said employee is able to earn are \$27 a week, said earning capacity dating from Feb. 5, 1914.

In order to be entitled to compensation on account of partial incapacity, the employee must in fact earn less wages than at the time of the injury. The section applicable provides: "While the incapacity for work resulting from the injury is partial, the association shall pay the injured employee a weekly compensation equal to one-half the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter. . . ." Grady's average weekly wages at the time of the injury were \$27. His average weekly wages as treasurer and manager on and after Feb. 5, 1914, were fixed by the corporation which engaged him at \$27 a week. "Half the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter" is nothing; therefore the Board finds that nothing is due the said employee under this section.

The employee sustained a "loss by severance of at least one

phalange of a finger," and was entitled to and has received the additional compensation provided by the statute for said loss. This provision was intended to compensate an employee for the specific loss sustained, upon a workmen's compensation basis, and is entirely apart from the payments which are due, provided the employee suffers loss of earning power by reason of the injury. This employee is not now suffering, by reason of the injury, from a loss of earning power as treasurer and manager. The corporation which engaged him fixed his salary at the same rate as that earned by him "before the injury," and until there is a loss in earning power, by reason of the personal injury received, no compensation is due under the statute.

Since the Workmen's Compensation Act provides that compensation shall be paid on account of total incapacity for work for a period of five hundred weeks from the date of the injury, and for a period of three hundred weeks from said date if the incapacity becomes partial, the right is reserved to review this case under Part III., section 12, at any time during the prescribed periods, if the facts warrant said review.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 777.

JOHN CALLAHAN, *Employee.*

A. G. WALTON, *Employer.*

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., *Insurer.*

PERSONAL INJURY WHICH OCCURS SEVERAL HOURS AFTER THE
EMPLOYEE PERFORMS ERRAND GIVEN HIM BY HIS SUPERIOR,
AND AT THE END OF HIS SATURDAY NIGHT'S DIVERSION,
DOES NOT ARISE OUT OF THE EMPLOYMENT.

The employee completed his day's work at 4 o'clock, and was requested by his foreman to report for duty the following day, at which time he was to bring a bottle of muriatic acid for use in connection with the work of soldering. During the evening, at about 7.30 o'clock, he purchased the acid and placed the bottle and contents in his right-hand hip pocket. He then visited a place where intoxicants

were sold and enjoyed himself in other ways until about 10 o'clock, when he felt a wet substance on his right hip. Upon examination he noticed that about one-third of the acid was gone, and later found that he had sustained a third-degree burn as a result of the contact of said acid with his flesh.

Held, that the injury arose out of and in the course of his employment.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board, revising the findings of the committee of arbitration, decides that the injury did not arise out of and in the course of the employment.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of John Callahan v. Employers' Liability Assurance Corporation, Ltd., this being case No. 777 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of David T. Dickinson of the Industrial Accident Board, chairman, Percy B. Lamb of Chelsea, representing the employee, and W. Lloyd Allen, Esq., of Boston, representing the insurer, heard the parties and their witnesses in the Aldermanic Chamber, City Hall, Chelsea, Mass., on Tuesday, April 21, 1914, at 10.30 A.M. John M. Morrison, Esq., appeared as counsel for the insurer.

This employee is a laborer. On Oct. 4, 1913, a Saturday, about 4 o'clock, at the close of the day's work, he was asked by his foreman to report for extra work on the following day, Sunday. The work was to begin at 7.30 o'clock A.M. on that Sunday, and the employee was to assist in soldering some metal. He was further asked by the foreman to get a pint of muriatic acid and bring that to the place of work the next morning, to be used in connection with the work of soldering. He had assisted in the work of soldering before. He was not told to purchase the acid at any particular place or time, or given any directions as to its keeping or custody. After receiving these orders the employee intended to buy this acid at a drug store, about five minutes' walk from his home. It was nearer for him to reach his home after his work Saturday by going directly there than by going to the drug store first. He accordingly went home first, changed his clothes, and went out, intending to buy the acid during the period when he was out on his recreation Saturday evening. He bought a pint bottle of muriatic

acid at said drug store about 7.30 o'clock Saturday evening, at which place it was done up by the druggist, corked and wrapped in a paper package. He put this package in his right hip pocket and stayed in Chelsea during the evening until about 10 o'clock. During this time he had taken a few drinks, but there was no evidence introduced or brought out at the hearing that he was intoxicated.

The insurer was represented at the hearing by counsel, who interrogated the employee. About 10 o'clock in the evening he went with a friend to Boston, and while waiting for the car felt a wet substance on his right hip, and said to the friend, "I guess that's the acid." His friend replied, "Will that burn you?" He, the employee, said, "I don't think so. I think it will just discolor." He testified that about one-third of the acid was gone.

Evidence was not introduced or brought out at the hearing that the employee drank anything further in Boston. While in Boston the acid began to irritate and hurt him so much, where it had come in contact with him, that he went to a hospital for relief. He received a third-degree burn by the acid, and was incapacitated for labor for a period of four weeks from the date of the injury, and employed and received medical aid during the first two weeks after the injury. His average weekly wages were \$12.

The insurer contended that the injury did not arise out of or in the course of his employment; that he had an opportunity to take the acid home before continuing out during the evening, and he should have done so; and that by failing to do this the injury arose out of and incidental to his evening's recreation and not his employment.

The employer's report of the accident states that it occurred in the course of an errand. No time was specified by his foreman for the performance of this errand; it was left to the employee's discretion when he should do it.

The committee finds that a laborer might reasonably believe that this bottle, done up and sealed in a package, as it was, was safe for him to carry during the evening, while it was in his pocket, without damage from its leaking or burning him, and that what he did was fairly within the scope of the errand that he was asked to do, and that the injury therefore arose out of and in the course of his employment.

If it had been shown that the employee was intoxicated, and that the bottle was broken or became uncorked as a result of behavior while in a state of intoxication, such facts might call for a different decision.

The committee finds that there is due the employee compensation at the rate of \$6 per week from Oct. 18, 1913, the fifteenth day after the injury, to Nov. 2, 1913, and the reasonable charges for medical services rendered him on account of said injury during the first two weeks after said Oct. 4, 1913.

This decision and all findings regarding compensation or the existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III., of the Workmen's Compensation Act and the general provisions of said act and its amendments.

DAVID T. DICKINSON.

PERCY B. LAMB.

Dissenting Opinion.

In addition to the facts set forth by the majority report it is important to note that the evidence shows fairly that the employee was acquainted with the use of muriatic acid and its action; that the employee testified he bought the acid at the drug store at 7.30 P.M., because he was *then* planning to go to Boston for an evening of recreation, and he then knew he would not return to Chelsea until at least after 11 P.M., the closing time of that particular drug store; that he hung around Chelsea until nearly 10 P.M., though he might have gone home with the acid in five minutes; that about 10 P.M. he started for Boston, still carrying around the bottle of acid in his hip pocket.

Upon all the evidence I find and rule that this was an injury which did not happen in the course of the employee's employment, and did not arise out of the same.

W. LLOYD ALLEN.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, New Albion Building, Boston, Mass., on Wednesday, June 3, 1914, at 2 P.M., and, revising the report of the committee of arbitration, finds and decides as follows:—

The facts may be briefly stated: John Callahan, the employee, completed his day's work at 4 o'clock on Saturday afternoon, Oct. 4, 1913, and was requested by his foreman to report for extra duty the following day, at which time he was to bring a pint of muriatic acid for use in connection with the work of soldering, at which he had previously assisted. No directions as to when or where the purchase should be made were given the employee. During the evening, at about 7.30 o'clock, he purchased the acid and placed the bottle and contents in his right-hand hip pocket. He remained in Chelsea until 10 o'clock, taking a few drinks of intoxicating liquor during the evening, but there was no evidence to show that he was intoxicated, or that the injury was caused by reason of a condition due to drinking said intoxicants. At about 10 o'clock in the evening he felt a wet substance on his right hip, and upon examination noticed that about one-third of the muriatic acid was gone. As a result of contact with the acid the employee sustained a third-degree burn, and was thereby incapacitated for a period of four weeks from the date of the injury.

In considering the claim for compensation of the employee the Board is required to pass upon the question as to whether this injury may properly be said to have arisen out of and in the course of his employment. If the employee had purchased the muriatic acid and proceeded within a reasonable time to his home, and while so proceeding to his home received the injury, there would probably be no question as to his right to compensation. Or if the employee, having taken the acid home, had met with the injury while taking it to his place of employment on the following morning, his right to compensation would not be denied.

The Board is of the opinion, however, that the insurer is not required to pay compensation in such a case as this, when the injury occurs two and a half hours after the employee performs the errand given him by his superior, and at the end of his Saturday night's diversion or entertainment. (Smith *v.* Morrison, 5 B. W. C. C. 161 C. A. (1911); Halvorsen *v.* Salversen, 5 B. W. C. C. 519 C. S. (1911).)

The Board finds, upon all the evidence, that the injury did not arise out of and in the course of the employment of the employee, the said John Callahan, and the claim of the said employee is therefore dismissed.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 781.

GEORGE A. FLETCHER, *Employee.*
GLOBE NEWSPAPER COMPANY, *Employer.*
CASUALTY COMPANY OF AMERICA, *Insurer.*

SUBSTITUTE MAILER NOT A CASUAL EMPLOYEE.

The employee was a substitute mailer, and had been employed in that capacity by various newspapers for a period of about a year. He had worked for the subscriber on the night shift of Jan. 14, 1914, and the day shift of Jan. 15, 1914, receiving the personal injury which incapacitated him on the latter date. He had not during the past year been employed by the subscriber, but had worked as a substitute mailer at other newspaper offices. While the employee worked for the Globe Newspaper Company for only two days as a substitute mailer, the evidence showed that the employee's work as a substitute for other members of the American Newspaper Publishers' Association, all of whom were under contract with the typographical union, of which the employee was a member, to hire only union mailers, enabled him to earn an average weekly wage during the past year of not less than \$20, thus showing that his employment was substantially regular.

Held, that the employee was entitled to compensation.

Review before the Industrial Accident Board.

Decision.—The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of George A.

Fletcher v. Casualty Company of America, this being case No. 781 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Dudley M. Holman of the Industrial Accident Board, chairman, Franklin M. Cohen, Esq., representing the employee, and Herbert L. Barrett, Esq., representing the insurer, heard the parties and their witnesses in the Hearing Room of the Industrial Accident Board, 1 Beacon Street, Boston, Mass., on Monday, March 30, 1914, at 10 A.M., and on Monday, May 18, 1914, at 3 P.M.

George A. Fletcher, 30 Temple Street, Boston, is a newspaper mailer, and was at work for the Globe Newspaper Company on Jan. 15, 1914, when he was injured by slipping off the side of a platform. He sprained his ankle and broke a bone in his leg. He was receiving \$3.15 a day as a mailer. He belongs to the union, and at the time he was injured was a substitute. A substitute is supposed to fill any position; that is, if a man lays off, the substitute takes his place, no matter what he does. During the past year Fletcher has worked for different Boston newspapers as substitute, but is not employed regularly on any of them.

The insurance company contended that Mr. Fletcher's employment was but casual, and that he was not entitled to recover compensation.

It appeared in evidence that he applied, on Jan. 14, 1914, for a position as substitute on the "Boston Globe," and worked that night; that he then applied the following morning, there being a vacancy, and while he was completing that day's work he received the injury. The Boston newspapers are members of the American Newspaper Publishers' Association, and they have contracts with the International Typographical Union and with the Boston Mailers' Union No. 1, which is a branch of the International Typographical Union. They do not employ men as individuals, but make their contract direct with the International Typographical Union and with Boston Mailers' Union No. 1 and it is part of that contract that no one not a member of Typographical Union No. 13 or Boston Mailers' Union No. 1, shall be employed by any of the papers except in cases of emergency when the unions are unable to furnish

union men, and as soon as union men are furnished non-union men employed during the emergency must give way for the union men. The laws of the union regulate when a "substitute" may become a "regular," and the newspaper itself has no choice in the matter, its contract being made with the union and not with individual members of the union. A substitute ordinarily makes more money than a regular man, from the fact that he can work both day and night, whereas when a regular accumulates a full day's overtime in a newspaper office he is forced to take a day off within the next financial week and put on a substitute. In this instance Fletcher was a substitute who had worked mostly on the "Boston Journal" and the "American," but who would have had to work anywhere that he was required. It was denied that he was in any way a casual laborer.

George A. Fletcher stated that he is a newspaper mailer and was at work for the Globe Newspaper Company on Jan. 15, 1914, when he was injured by slipping off the side of a platform. He sprained his ankle and broke a bone in his leg. He was receiving \$3.15 a day as a mailer. He belongs to the union, and at the time he was injured was a substitute. A substitute is supposed to fill any position; that is, if a man lays off, the substitute takes his place, no matter what he does. During the past year Fletcher has worked for different Boston newspapers, but is not employed regularly on any of them at the present time. He has worked regularly on the "Journal" and received \$18.90 a week during that time. He received this amount for six days' work besides \$6.04 which he received while working for the "Boston American" on Saturday nights.

Mr. Batchelder, attorney for the insurer, objected to Mr. Fletcher telling the committee what the custom was among newspaper offices and men in the mailing department in regard to substitutes.

Mr. Fletcher stated that these substitutes go from one office to another, every day or every night, to fill the vacant places, and once in so many days each man has to lay off to give the substitute an opportunity to earn something. This is a rule. He further stated that he belongs to the International Typographical Union, Boston Mailers' Union No. 1. He was a

member of this union at the time of the accident, and was subject to its rules and regulations at that time. If, while he was on the substitute list, word came to him from the union that there was a vacancy in the "Boston Herald" office, he would have been obliged to go there, and it would be the same if he were notified of a vacancy at the office of the "Boston American" or "Boston Globe." The regular men have to lay off once in six or eighteen days to give the substitutes an opportunity to work. He has no idea how many men there are on the substitute list. The men have ten minutes in which to cover all the offices when looking for work. As a rule, the "Boston Post" telephones at night if it wants substitutes. A man remains a substitute until he finds a steady job. Fletcher stated that he came here from Chicago and was on the substitute list for about a year. He has been here about fourteen years. Before he was injured he was on the substitute list about four or five months. Outside of that time he has been a steady man since he came here. On the day he was hurt at the "Boston Globe" he was hired for a day. If you work for one hour you receive a day's pay. He had worked at the "Globe" the night before on the night shift. He cannot say whether or not he worked for the "Globe" within a year of the date of the accident, unless he looked it up in the books. He was not regularly employed by the "Globe." He was employed by the "Globe" occasionally more than a year ago, but there was no regularity about this employment. He had worked regularly for the "Journal" for six or seven years, and got through there some time in August. Since that time he has not had any regular employment. He would prefer having a regular job to being a substitute in his profession. He has tried to work a couple of times since the accident, but was obliged to give up, and is not in shape to work yet. He can do a little work, but cannot take any one's place and do a day's work. When he first tried to work after the accident he worked for about three and a half hours. He stated that he will probably be all right in a week. While working as a substitute, it depends largely on the man as to what his wage is. At times he can put two weeks' work into one. His employment is partially limited to his willingness to work. There are times in

the year when he can obtain more work than at others. A substitute may get work for one, two or three days, or he may get work for six or eight days and work on double shift. According to the custom that prevails in all union offices, he can go to any office where there is a vacancy and they are obliged to employ him if he is a competent man. Fletcher stated that he is not under the doctor's care at present, but is using a liniment for his foot. When he was injured he went to the Relief Station, then to the City Hospital and after that was treated by Dr. Provandie of Melrose Highlands. Since the time he left work in August he has not done much work. He went on a visit and remained away for six weeks. After his return he again went to work on the newspapers. He stated that he could give no estimate as to the amount of his average weekly wage from the time he returned from his vacation to the date of the accident. He later stated that he might have averaged about \$20 a week. He worked steadily on Saturday nights for the "Boston American," and in addition to that he worked about four full days during the week. A record of the days on which he worked could be obtained from the different offices. Besides working for the "American" and "Journal," he also worked a few days for the "Post." He stated that he might have earned \$50 from the "Post" during that period. He could not say whether he stopped working regularly on the "Journal" on September 18. He could not say how often he had worked for the "Globe" during the last few years, — it might have been once or twice or a dozen times. The rules, as he stated them, apply not only to the local union, but to unions all over the country. The substitutes are hired by the foreman or the chairman of the chapel. Fletcher did not substitute for the same man in the morning that he did the night before.

Michael J. Horan, in charge of the time books in the mailing department of the "Boston Globe," stated that he looked through the time books of the "Globe" for a year past, and found that Fletcher had worked for them but twice, — on January 14 and January 15. He worked on the night shift on January 14 and on the day shift on January 15. He did not go through the books further than one year back. Fletcher was not

employed regularly by the "Globe." At the time he was injured the "Globe" employed twenty regular men and about six regular substitutes. These substitutes have the preference if a regular man is out. The "Globe" maintains a regular substitute list. These regular substitutes generally average a full week's pay. Besides substituting for the regular men they are given the preference in any extra work, such as the colored supplement. Fletcher was not a regular substitute at the "Globe." Outside of the six regular substitutes there are about six or eight men who substitute occasionally. They might work for one day or four or five days. Some weeks the "Globe" has no occasion to employ any substitutes besides the regular ones. If a regular man is going to be out he generally engages a substitute in advance. He cannot leave without making arrangements for a substitute to take his place, in order that the shift may not be idle. He cannot put a non-union man on.

Charles E. Wadleigh, foreman of the mailing department at the "Globe," stated that if the regular man and the regular substitute did not come to work he could press any one into service. If he took a man who did not belong to the union and a union man applied for work, he could not keep the non-union man indefinitely. Mr. Wadleigh did not employ Fletcher for the night shift, as he himself works only during the day. There was a vacancy and no regular substitute was available, and as Fletcher was there, Wadleigh employed him for the day.

Edward A. Boyle, 30 Roseclair Street, Dorchester, stated that he is a member of Typographical Union No. 13, and the Mailers' Union is affiliated with the International Typographical Union. A substitute is a man not regularly employed in any one office. He shows up for work on either the day or night shift or both. He may be employed by the office three or four nights a week. In case a regular situation holder fails to appear, the substitute covers his situation. On the three latter nights in the week — Thursday, Friday and Saturday — the office puts on, at times, twenty or twenty-five men who are not regular situation men. When a man is working for a "regular" he is called a "substitute"; when he is working for the office he is called an "extra."

This is done simply to distinguish a man who is hired by a regular from one who is hired by the office. The chairman of

the office keeps a list of all these substitutes, and the foreman keeps a list to correspond with the chairman's. This is a list of all the substitutes who might show up. A man's presence on the floor is sufficient indication that he is looking for work. He is at the call of any of the men or of the foreman of the office. When a man is working for a regular he is marked as though the regular man was there, — against the regular's number. The substitute receives his pay from the cashier. If a regular man has worked a day overtime he is obliged to take a day or a night off and give that work to the first competent substitute — any man who is on the floor and is a union man.

B. P. Fouhy of the "Boston Globe" stated that he is a member of the Boston Mailers' Union No. 1. If a regular man does not appear for work by 8.50 A.M. a substitute is put on to cover the situation by 9.10 A.M. If there is no substitute on the floor the chairman will go out, and if he finds a man on the street — a union mailer — he can demand that he go to work to fill the situation in that office. Certain substitutes report regularly at an office. It is provided in the by-laws of the constitution that all extra work shall be given to substitutes. The substitute who is senior in point of service is entitled to the first vacancy. It frequently happens that the foreman does not like certain substitutes, and when he hires extra men he can pick out any five or six on the floor, but in filling a vacancy he has to take the man who is oldest in point of service. A foreman has a right to punish a regular man who doesn't cover his situation; for instance, if the regular man does not come to work at 12 or 12.10 o'clock at night, a substitute is put on and the foreman tells the substitute to come to work the next night, and when the regular man comes the next night the foreman tells him he did not know he was coming and that he has another man in his place. A fine of \$3 is provided for any regular who doesn't cover his situation. A man can be compelled to go to work, whether or not he wishes to, if he is available. The newspapers agree to all the requirements of the union, with the exception of working hours, wages and conditions. These are subject to arbitration. The agreement is an agreement to arbitrate everything that comes up. It prevents strikes and also prevents publishers from locking a union man out. A substitute can earn more money than a regular man. A regular man cannot earn

more than \$25 a week, while a substitute can earn \$45, because he has the privilege of working both day and night. If a regular man is going to be out he has the right to select his own substitute, and the foreman has nothing to say about it. At the "Globe" office the substitute is paid from the office, but there are some offices where the foreman will take the money out of the regular's envelope to pay the substitute. The substitutes are paid at the end of the week, the same as are the regular men. A regular man can lay off indefinitely if he is ill and can prove it by a doctor's certificate, but if he is away on a vacation he must cover himself by working a week or so every several months. The employer does not have to give his consent or be notified. The mere fact that a substitute is allowed to work in an office is a guarantee that he is competent. The situation belongs to the union and not to the individual. A regular man may become a substitute by losing his position or giving it up.

We find, therefore, after a study of the rules of the International Typographical Union No. 13 and Boston Mailers' Union No. 1, which are hereto attached, and in view of all the evidence, that George A. Fletcher was an employee of the Globe Newspaper Company on Jan. 15, 1914; that his employment was not casual; that he received an injury while in the course of and arising out of his employment; that he is entitled to recover compensation beginning with the fifteenth day after the injury up to and including April 15, 1914, at which time he was able to return to work; that his average weekly earnings were not less than \$20 a week; and that he is entitled to eleven weeks' compensation at the rate of \$10 a week, amounting in all to \$110.

This decision and all findings regarding compensation or the existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III., of the Workmen's Compensation Act and the general provisions of said act and its amendments.

DUDLEY M. HOLMAN.
FRANKLIN M. COHEN.

Herbert L. Barrett dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, New Albion Building, Boston, Mass., Thursday, July 30, 1914, at 2 P.M., and affirms and adopts the findings and decision of the committee of arbitration.

The only point at issue in this case is whether or not the employment of George A. Fletcher, the employee, was casual.

The evidence shows that the subscriber, the Globe Newspaper Company, is a member of the American Newspaper Publishers' Association, and that the employee, George A. Fletcher, is a member of the Boston Mailers' Union No. 1, which in turn is affiliated with the International Typographical Union. The publishers' association and the typographical union are bound by contract to hire and furnish, respectively, members of the latter organization. Men are not hired as individuals but as members of the union, and the subscriber was bound, by the terms of its membership in the publishers' association and the latter's contract with the union, to employ only union workers, except in cases where the union found it impossible to furnish same. The membership of the union is made up of what are known as "regulars and substitutes," the former having constant employment in the office of a certain newspaper and the latter having constant employment in the offices of different newspapers. All employees, regular and substitute, are furnished, as per contract, through the International Typographical Union.

In this case Fletcher was a "substitute" mailer and had been employed in that capacity by various newspapers for a period of about a year. He had worked for the Globe Newspaper Company on the night shift of Jan. 14, 1914, and the day shift of Jan. 15, 1914, receiving the injury which incapacitated him on the latter date. He had not, during the past year, been employed by the "Globe," but had worked as a substitute mailer at other newspaper offices, and in the course of his employment earned not less than \$20 a week. The usual practice in hiring substitutes is through the "chairman" of the newspaper office, the "chairman" being the authorized representative of the union.

While Fletcher worked for the Globe Publishing Company for only two days as a "substitute," the evidence shows that the employee's work as a "substitute" for other members of the American Newspaper Publishers' Association, all of whom were under contract with the typographical union to hire only union mailers, enabled him to earn an average weekly wage during the past year of not less than \$20, thus showing that his employment as a mailer in the service of the papers covered by the contract between the association and the union was substantially regular or constant, and that, under the terms of said contract, his employment was not casual, since he was regularly employed at one time or another by different members of the publishers' association. The contract in force between the newspaper association and the union was so broad that the Globe Newspaper Company would be within its rights in demanding that the employee perform work for it at any time that he was not engaged in the performance of his work for any other member of the association. Had Fletcher, the employee, been passing the office of the subscriber, and the latter needed the services of a mailer, he would have been obliged to respond to a call for employment, so binding is the contract that exists between the newspaper association and the union. Fletcher's work as a substitute mailer may well be likened to that of a longshoreman who performs work for many employers during the course of a year, and whose average weekly wages must be computed on the basis of his earnings in that occupation for a period of twelve months prior to the date of his injury.

The Board therefore finds, upon all the evidence, that the employee, George A. Fletcher, received a personal injury, arising out of and in the course of his employment, which totally incapacitated him for work for a period of thirteen weeks from Jan. 15, 1914; that said employment was not casual; and that there is due him from the insurer the sum of \$110 as compensation on account of his total incapacity for work, dating from Jan. 29, 1914.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID F. DICKINSON.
JOSEPH A. PARKS.

CASE No. 792.

BARNARD ARTENSTEIN, *Employee.*

MANSON & MCPHEE, *Employer.*

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., *Insurer.*

CONTRACTEE NOT ENTITLED TO COMPENSATION BECAUSE OF A
PERSONAL INJURY RECEIVED WHILE VOLUNTARILY AIDING
CONTRACTOR TO FULFILL CONTRACT.

The claimant, the contractee, a carpenter by trade, received a personal injury while voluntarily aiding the contractor to complete his contract. The evidence showed that there was no relation of master and servant between the parties. *Held*, that the claimant was not an employee and therefore not entitled to compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Barnard Artenstein v. Employers' Liability Assurance Corporation, Ltd., this being case No. 792 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of Edward F. McSweeney of the Industrial Accident Board, chairman, Joseph W. McConnell of Tremont Building, Boston, representing the employee, and William A. Murray of 829 Tremont Building, Boston, representing the insurer, heard the parties and their witnesses at the Hearing Room of the Industrial Accident Board, New Albion Building, Boston, Mass., Wednesday, April 8, 1914, at 2 P.M.

Barnard Artenstein makes a claim for compensation against the Employers' Liability Assurance Corporation, Ltd., on the ground that while employed by Manson & McPhee, who are insured with said company, and while working on a machine saw, he was injured, and the third finger of his left hand severed.

Barnard Artenstein testified that he is a carpenter by trade, but at the time of this hearing was not working for anybody. He was formerly in partnership with a man named Cohen, and they had a little store on Whipple Street in Boston. Some weeks before the injury Artenstein desired to make some extension

tables, and made an arrangement with McPhee whereby Artenstein would supply all the material for these tables, and McPhee would mill them for \$1 each. Later, Artenstein decided to make up a hundred tables, and supplied McPhee with the stock therefor, but McPhee was slow in turning them out. Artenstein had some conversation with McPhee, as a result of which McPhee allowed him to come in and help with the work. McPhee told him he could help on the tables, and later they would square up with each other as regarded the matter of payment of use of machinery. No specific arrangement about pay for Artenstein's labor was made, McPhee simply telling him he could go ahead and help make the tables himself. He did go to work for McPhee, and on the day specified was working on a saw when the injury occurred. Of the hundred tables ordered, sixty were finished. McPhee was paid \$50 and Artenstein still owes \$10.

McPhee, of the firm of Manson & McPhee, testified that the first he ever heard of Artenstein was from a Mr. Wolfe, who told him he knew a man who wanted some milling work done. McPhee saw Artenstein, who described the work required, and McPhee agreed that the tables would be milled for \$1 apiece, which would not include the stock, to be furnished by Artenstein. The first lot of twenty-five tables was made up, and although not in the contract McPhee allowed Artenstein to put them together in his shop. Later, Artenstein wanted one hundred tables milled, and the stock for this order was furnished by Artenstein to McPhee. McPhee testified that Artenstein complained that the tables were not being done fast enough, and offered to help himself. McPhee granted him permission to bring in the stock, to use saw, and such other things as were helpful in order to expedite the job. No special time was named for Artenstein to report for work or to leave, this being wholly optional with him. He was not McPhee's employee, was not considered so, and could come and go when he wished. Mr. McPhee produced the pay-roll book, which showed that Artenstein had not been on the pay roll during this period. At the present time Artenstein owes McPhee about \$20. The swing-saw, which was the cause of the injury, was used by McPhee's employees as well as Artenstein. This saw was in use about one-third of the time in McPhee's regular work. If Mr. Arten-

stein wished to use it during the time it was not being used on the regular work he was at liberty to do it.

From all the evidence the arbitrators find that on November 22 Barnard Artenstein was not an employee of McPhee, and that the relation of master and servant did not exist between them; that, therefore, the Employers' Liability Assurance Corporation, Ltd., is not obligated to pay compensation for the injury to Artenstein, which occurred as a result of this accident in McPhee's shop on the above-named date.

EDW. F. MCSWEENEY.

JOSEPH W. MCCONNELL.

WILLIAM A. MURRAY.

CASE No. 796.

CATHERINE M. CAMPBELL, WIDOW OF WILLIAM CAMPBELL
(DECEASED), *Employee*.

ESTATE OF JAMES S. STONE, *Employer*.

ÆTNA LIFE INSURANCE COMPANY, *Insurer*.

DEATH OF EMPLOYEE NOT DUE TO POISONING AND INFECTION FROM INSECT BITES, AS CLAIMED.

The widow testified that on an occasion about two years before the date of the hearing the employee was bitten and poisoned by insects while in the performance of his work as janitor and caretaker, cleaning a cellar in connection with said property, and that his death was a result of the poisoning and infection from these insect bites. The evidence showed that death was due to chronic cardiac valvular disease, complicated by septicæmia, having no causal connection with the injury, as alleged.

Held, that the death of the employee did not have a causal relation with a personal injury arising out of and in the course of the employment.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Mrs. Catherine M. Campbell, widow of the deceased employee, *v.* Ætna Life Insurance Company, this being case No. 796 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of David T. Dickinson of the Industrial Accident Board, chairman, H. A. Hallett, representing the employee, and N. P. Sippelle, representing the insurer, being duly sworn, heard the parties and their witnesses at the Hearing Room of the Industrial Accident Board, New Albion Building, 1 Beacon Street, Boston, April 14, 1914, at 2 P.M.

The employee in this case was a janitor and caretaker of the property of the James S. Stone estate located at 152 Bay State Road, Boston. He worked for the above employer in performing these duties for about six years before the hearing. He died at the Massachusetts General Hospital on Feb. 1, 1914.

His average weekly wages at the time of death were \$15.

The claimant was his widow, and was living with the deceased at the time of the injuries hereafter referred to and his death. The claimant testified that on an occasion about two years before the date of this hearing the deceased was bitten and poisoned by insects while in the performance of his work as janitor and caretaker, cleaning a cellar in connection with said property, and that his death on Feb. 1, 1914, was a result of the poisoning and infection from these insect bites. The cause of his death, as shown by the records of the Massachusetts General Hospital, was "chronic cardiac valvular disease, mitral regurgitation, which was complicated later by septicæmia, from which he died on Feb. 1, 1914."

Mr. Arthur R. Brown, a former employer of the deceased, testified that while in his employ, about six years, the employee complained a great deal of heart weakness, and appeared to be weak and exhausted.

Dr. Garland testified that he was the family physician of the deceased, and had sent him to the Massachusetts General Hospital for treatment for a disorder of the heart about three weeks before his death, and had done this because the employee was in such condition by reason of the heart disorder that he then appeared to be likely to die therefrom in the near future.

Dr. Francis D. Donoghue, called by the insurer, testified that bites from insects, as testified to by the claimant, could not have caused the heart disorder and weakness from which

the employee came to his death, nor have been a contributing cause to such heart weakness or death; that the deceased had recovered and got well from the effect of the bites of the insects, which had only a surface and external bodily effect and not an internal or permanent one.

The committee finds that the death of the employee was not caused by, or the result of, the injury sustained by him through the biting of said insects, and did not arise out of, or result from, an injury arising in the course of his employment, and that compensation is therefore not due from the insurer to the claimant by reason of the death.

DAVID T. DICKINSON.

H. A. HALLETT.

N. P. SIPPRELLE.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, New Albion Building, on Wednesday, May 27, 1914, at 2 P.M., and affirms and adopts the findings and decision of the committee of arbitration.

The Board further finds that the poisoning and infection from which the employee suffered, and which the dependent widow, Mrs. Catherine M. Campbell, claims to have been a material contributing cause of his death, occurred two years prior to his death and had no connection therewith, said poisoning and infection having had only a surface and external bodily effect, from which the employee had fully recovered. The death of the employee did, in fact, result from chronic cardiac valvular disease, mitral regurgitation, which was complicated later by septicæmia, and the poisoning and infection from the bites of insects did not contribute to such heart weakness, septicæmia or death.

The death of the employee, William Campbell, not having any causal relationship with a personal injury arising out of

and in the course of his employment, the claim of the said widow for compensation under the statute is dismissed.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 798.

CATHERINE COYLE, WIDOW OF THOMAS COYLE (DECEASED),
Employee.

STAR BREWING COMPANY, *Employer.*

MASSACHUSETTS EMPLOYEES INSURANCE ASSOCIATION, *Insurer.*

EMPLOYMENT OF DECEASED NOT CASUAL AND WIDOW IS ENTITLED TO COMPENSATION. AVERAGE WEEKLY WAGES OF A BREWERY WORKER ALSO AT ISSUE.

The evidence showed that the employee, a brewery worker, and member of the union, was engaged by a brewery representative at the union rate of \$3 a day, the employment offered being that of helper in sinking and digging a well, and the employment in which he actually was engaged at the time of the injury being that of a helper in the carrying of pipes from the boiler room of the brewery. No time was fixed as the period of his employment, but the evidence showed that it would be at least two months, and possibly more. After working seven days the employee received a scratch from a pipe which he was carrying, dying two weeks later from septic pneumonia. The insurer claimed that the employment was casual, and that the average weekly wages of the employee should be based on that earned by a laborer performing similar work regularly during a period of twelve months.

Held, that the employment was not casual, and that the average weekly wages of the employee were \$18.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Catherine Coyle, dependent of Thomas Coyle, deceased, *v.* Massachusetts Employees Insurance Association, this being case No. 798 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Joseph A. Parks, chairman, representing the Industrial Accident Board, Edmond F. Ward, representing the employee, and Abraham E. Pinanski, representing the insurer, heard the parties and their witnesses in the Hearing Room, New Albion Building, Monday, April 13, 1914, at 10 A.M., and Tuesday April 21, 1914, at 2 P.M.

John W. Cronin, Esq., represented the insurer and Charles S. Sullivan, Esq., the dependents of the employee.

The questions in dispute were whether the employee received a personal injury arising out of and in the course of his employment; whether his employment was casual, and if not casual, whether it was in the usual course of the trade, business or occupation of his employer; and if the dependent widow was entitled to compensation, what the average wages of the employee were.

Dr. Samson A. Callahan, the first witness, testified that he had attended the employee, Thomas Coyle, for a number of years, and attended him on the morning of Jan. 24, 1914, at which time his right thumb was inflamed and swollen. He had a superficial wound on the inside of the thumb and was advised to call on the following day. The injury indicated that the employee had lost ground, and on the following day when he called the swelling had developed into the hand. On the next day the condition extended to the shoulder, and an operation was advised at the Massachusetts General Hospital. The operation was not successful, the employee developing septic pneumonia and dying twelve days after the time of the first treatment by the physician. His diagnosis was septic infection, the germ in the cut having caused general blood poisoning and pneumonia. The employee had informed the physician that his injury was received while at work, the doctor's impression being that he stated he received it while cleaning pipes, but was not absolutely sure as to that. In the opinion of the doctor it was a fresh cut when he first saw it.

Mrs. Catherine Coyle, the widow of the employee, testified that she lived with him at the time of the injury, and that he was a brewery worker. Mr. Coyle had been working at the brewery for seven days when he received the injury. He had informed her that he had been working outside, at a well, doing

anything he was required to perform, and that he had injured his finger while carrying rusty iron pipes from a wash room. He was assisted by another employee, Thomas McDonough. She bathed the injured part in sulpho-naphthol and clear water, the cut not being deep but apparently very sore. The injury was received on January 22, and he saw the physician on Jan. 24, 1914. Death occurred on Feb. 5, 1914.

Catherine E. Coyle, a daughter of the employee, testified that she talked with her father on Friday night, the 23d, and suggested that he had better see a physician, but he stated that he was obliged to go to work on Saturday morning, and that he thought his finger would come around all right. About 1.30 o'clock Saturday morning he was awakened by the pain and went to the physician at about 9 o'clock. He told her that he had been cut or scratched while handling iron pipes at the Star Brewery. He had been connected with brewery work all his life, and previously drove a team for the Highland Spring Brewery Company.

Thomas McDonough of South Boston, a fellow employee, testified that he was a brewery worker at the Star Brewery, his usual employment being that of a barrel washer. He was engaged in carrying pipes with the deceased employee on Jan. 22, 1914, and knew that Mr. Coyle assisted in digging a well and carried pipes across the yard. Besides assisting in carrying pipes, he and Coyle had done work inside the brewery, — sandpapering a tank for about fifteen minutes. The employee told him the day after about the injury, stating that he had cut his hand with the pipes and that it was very sore. He saw the cut, but did not notice it particularly. He washed barrels and did anything else he was told to do in the line of general laboring work, receiving \$3 per day.

Patrick Malone testified that he was working at the Star Brewery on Jan. 22, 1914. He helped in digging the well, the employee Coyle working overhead and he working below. He was employed at the brewery for about four months "off and on," as he put it, and he received \$3 per day. It was at his suggestion that Mr. Kelly authorized him to secure the services of Coyle, and Coyle had been working seven days when the injury was received. He saw the cut on the thumb of Coyle on the

evening of January 22, when they were getting into the car, Coyle showing it to him and telling him that he cut it while carrying pipes. He saw Coyle on the following morning, when Coyle said that the thumb was very sore and the fingers stiff, and that he did not think he could work that day. He knew that the employee Coyle had been working in South Boston, but could not say whether it was on the new fish wharf or not, and had no idea of what kind of work he was doing. He knew that Coyle had been a teamster and had worked with him for four years on a team. The rate of wages for a teamster is \$19.50. Mr. Kelly said nothing to him about the length of time he was hired for, and he was not hired to dig the well, but was later put to work on the well. Mr. Coyle was hired to dig the well, but he also saw him doing work in the brewery. He was sand-papering a beer tank at the time, and that was the only time he saw him working inside. The first work that he himself had done in the brewery was piling staves in hogsheads, later working on the well. At the time, sand-papering the tank, there were four other men, — McDonough, Harkins, Kelly, Coyle and himself.

Timothy M. Kelly, brew master at the Star Brewing Company, testified that he hired and discharged the men and consulted the manager when he needed employees. He engaged Mr. Coyle through Mr. Malone about Jan. 16, 1914, to assist in sinking the well, which had been started in September. The well is not yet completed because frost set in and operations were therefore suspended. He did not know how long it would take to dig the well when Coyle was engaged. The well was being driven and excavated under the direction of Nelson W. Smith, as superintendent. It was the custom to telephone to the Brewery Workers' Union for all help, and it was agreed that Coyle should receive the usual wage of \$3 a day. This was the same rate of wages as he paid the other men. Harkins, Kelly and McDonough were general working men, and Glennon was a spare man, who was required to do anything necessary, the latter working since last May, off and on, until last February. He knew that Coyle was working on the well because that was what he was hired for. He saw him carrying pipes and showed him where to put them. The insurance company required them to repair a boiler, which was

being done by the Hodge Boiler Works, and this necessitated the carrying away of the pipes which had been placed in front of the coal bin. It was particular work and had never been done before. Some of the men working inside in the brewery were put at work on the well, and in addition, extra men were hired, to wit, Patrick Glennon, Patrick Malone and Thomas Coyle. Work was stopped on the well about the 9th or 10th of February, and if Coyle had been there at the time he would have been discharged. Coyle worked seven days in all. At a continued hearing on April 21, 1914, the witness added that Coyle was a good workman, and that he would have kept him as long as the work lasted; and if any work turned up after the well work was finished, he would have kept Coyle if it were possible without the discharge of the other men. When he originally hired Coyle he had in mind only his employment during the work on the well.

Nelson W. Smith, in charge of the well, testified that he had received authority from Mr. Kelly to hire the deceased employee, as he needed additional help on the well, but that he had nothing to do with the hiring and discharging of the men, that being solely within the province of Kelly. It was customary to send the men back to Kelly if he did not need them any longer, and usually one of the men would ask him each night if he would come to work in the morning, Malone usually asking him, and Coyle asking two or three times. They had a great deal of trouble with the pump, which frequently broke down, not working right for several days at a time, during which period there would not be any work for the men. He could not let a man go without sending him to Mr. Kelly.

The committee of arbitration is called upon to decide three important questions, and in order to determine whether any compensation at all is due, it must first consider the question as to whether the personal injury received by the employee arose out of and in the course of his employment. The committee finds that the injury arose out of and in the course of the employment, the evidence leaving no doubt on that score.

Whether the employment was "casual" is a more difficult question to answer. The evidence shows, however, that Coyle, a brewery worker, and a member of the union, was engaged

by a brewery representative through said union, at the union rate of \$3 a day, the employment offered being that of a helper in sinking and digging a well, and the employment in which he actually was engaged at the time of the injury being that of a helper in the carrying of pipes from the boiler room, in which work he was assisted by another brewery worker. He was engaged, according to the man who acted with authority in hiring him, to work in connection with the sinking of the well, no time being fixed at the end of which he would be discharged, the agent of the employer stating that it was possible that he would be retained for the performance of other work because he was such a good workman. The period of his employment as a brewery worker in assisting in sinking and digging the well would be at least two months, with the possibility, as the evidence shows, of further employment; and this shows that his engagement was not "casual," but, on the contrary, was in the usual course of the business of the employer, since the digging of the well was a necessary part of that business, and the probable length of his employment removing all doubt as to the lack of casualness. The committee finds, therefore, that the employment was not casual, and that it was in the regular course of the business of the employing brewery.

The question of average weekly wages may be determined by having recourse to the average weekly wages earned by a brewery worker, in the same grade of employment, by the same employer, in the same district; and we find that the average weekly wage earned by such an employee is \$18, which is the average upon which the compensation due the dependent widow should be based.

The committee of arbitration further finds that the widow, the said Catherine Coyle, being conclusively presumed to be wholly dependent upon the said employee, Thomas Coyle, at the time of the injury, is entitled to the payment of a weekly compensation of \$9 for a period of three hundred weeks from the date of the said injury.

JOSEPH A. PARKS.
EDMOND F. WARD.

Abraham E. Pinanski dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, New Albion Building, Boston, Mass., on Thursday, July 2, 1914, at 11.30 A.M., and affirms and adopts the findings and decision of the committee of arbitration.

The material evidence is substantially set forth in the report filed by the committee. The attached requests for additional findings of fact, with the Board's memoranda in reference thereto, are made a part of the record in the case.

The evidence shows that Thomas Coyle, the employee, a brewery worker, and a member of the union, was engaged by a brewery representative through said union, at the union rate of \$3 a day, this being the minimum rate of wages at the brewery of the subscriber, the employment offered being that of a helper in the sinking and digging of a well, and the employment in which he was actually engaged at the time of the injury being that of a helper in the carrying of pipes from the boiler room, in which work he was assisted by another brewery worker. The fact that, in the short time that he was in the employment of the subscriber prior to receiving the injury which resulted in his death, Coyle was also called upon to assist in sand-papering a beer tank shows that the deceased was not looked upon merely as a well-digger, but was regarded as a competent brewery worker on account of his experience in that work for over twenty-two years, and was therefore called upon to do such brewery work as his experience fitted him for, and as the occasion required. The fact that the period of his employment as a brewery worker was not definitely fixed by the subscriber at the time of his contract of hire, and the possibility, as the evidence shows, of further employment because of the fact that he was recognized as a good workman, shows that said employment was not casual, but, on the contrary, was in the usual course of the business of the employer, since the digging of the well, the carrying of pipes, and the sand-papering of a beer tank were all in the usual course of the business of said employer and the actual and probable further

period of his employment, showing that it was not casual. The evidence also shows that the deceased received an average weekly wage of \$18, that being the average earned by a brewery worker in the same grade of employment, working for the same employer. The point raised by the insurer — that day laborers performing such work as digging wells earn an average weekly wage of \$13.50 — has no bearing upon this case, the employee being a brewery worker and engaged as such, and as a brewery worker received an average weekly wage of \$18.

The Board therefore finds, upon all the evidence, that the employment of Thomas Coyle, the deceased employee, was not casual, but was in the usual course of the business of the subscriber; that he received a personal injury which caused his death, said personal injury arising out of and in the course of his employment; that his widow, Catherine Coyle, lived with him at the time of his death; that his average weekly wages were \$18; and that the said widow is entitled to the payment of \$9 a week for a period of three hundred weeks from the date of the injury, Jan. 24, 1914.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
JOSEPH A. PARKS.

BOSTON, MASS., July 7, 1914.

Industrial Accident Board, Boston, Mass.

GENTLEMEN: — As per arrangement, I hereby make formal request that the following facts be added to the report of the committee of arbitration in the above case: —

1. Mrs. Thomas Coyle and Miss Catherine E. Coyle, the widow and daughter, respectively, of the deceased employee, testified in effect that in the two-year interval between his employment by the Highland Brewery Company and his employment by the Star Brewing Company he had been doing whatever general laboring work he could get; or, in other words, that he did not work continuously up to this time at his trade of a brewery teamster.

2. Mr. Thomas McDonough, a fellow employee, testified that Mr. Coyle carried pipes for a short time on the day that he received the injury, and that on one other occasion he worked inside, sand-papering a tank, for about fifteen minutes. These were the only times that McDonough knew he worked at anything besides digging the well. Except for these two oc-

casions none of the other witnesses, including the foreman in immediate charge of the work on the well, knew that Mr. Coyle had done any work besides shoveling at the well.

3. Mr. Kelly, the superintendent, testified that Mr. Coyle was employed on Jan. 16, 1914, because the digging of the well had then progressed to such a point and depth that a man was needed to stand near the mouth of the pit and throw back the gravel which was thrown up by the other men at its bottom; that this was the work that he hired Mr. Coyle to do, and that but for this work on the well Coyle's services were not needed. The well had not been completed up to the time of the first hearing, but the work on it was abandoned Feb. 9, 1914, and had not yet been resumed at the date of the last hearing. Had Mr. Coyle lived and continued at work he would have been let go Feb. 9, 1914, at which time Malone and Glennon were let go. The time when Mr. Coyle sustained his injury was the only time in the past twenty years that the Star Brewing Company had done any work removing boiler pipes, and there was no evidence that such work was likely to be done soon again.

4. No employee of the Star Brewing Company had been employed for a year next preceding Jan. 22, 1914, the date of Mr. Coyle's injury, at the same work as Mr. Coyle was doing for this company.

The above facts are all in evidence, are set forth substantially in the opinion of the dissenting arbitrator, and are deemed by the insurer to be important to its view of the case.

Respectfully submitted,

JOHN W. CRONIN,
Attorney, Massachusetts Employees Insurance Association.

With reference to request No. 1, the evidence shows that the deceased had finished his work for the Highland Spring Brewery "a few weeks" before he entered the employ of the subscriber, the transcript of the evidence given by Mrs. Thomas Coyle and Miss Catherine E. Coyle on this point being as follows:—

Q. (By Mr. Cronin). Do you know where he was working just before he went there? A. (by Mrs. Thomas Coyle). Highland Spring.

Q. How long ago? A. I could not tell.

Q. At work only a few days? A. Saturday.

Q. Had he been working just before he went there? A. No.

Q. Didn't he work some place in South Boston? A. Yes.

Q. Do you know where it was? A. No, sir.

Q. Did you know what he was doing in South Boston, where he was working, or what kind of work? A. I could not tell you anything about the work he was doing there.

Q. You do not know whether he was working at the new fish wharf? A. I think it was around there he was working.

Q. Got through with the Highland Spring months before? A. Just a few weeks, I think.

Q. Had been a driver down there? A. Yes, sir.

Q. Worked always as a teamster? A. Yes.

Q. Did he get through at Highland Spring? A. Yes. Rueters Brewery.

Q. After he got through at Rueters, went out looking for work and took what he could? A. Yes.

Q. You knew he worked some place in South Boston? A. Did not know exactly where it was.

Q. Did not know work? A. No, sir. He was not driving a team.

Q. Worked around breweries how many years? A. Worked in Mr. Sullivan's brewery for twenty-two years.

Q. Never worked at this brewery before? A. No, sir. Lost his life there.

Q. (by Mr. Cronin). Do you know where your father worked in South Boston just before he went to work in the Star Brewery? A. (by Miss Catherine Coyle). I think the fish wharf. I could not say.

Q. Was not doing teaming work? A. No.

Q. Down there, or any place else, suppose he was doing what he was told to, as far as you know? A. Yes.

Q. As a matter of fact, you did not know much about father's work? A. No.

With reference to request No. 2, the evidence is substantially as stated in the report of the committee. It is a fact that the evidence shows that during the short period of time intervening between Jan. 16, 1914, and Jan. 24, 1914, the employee had been employed only at well digging, except on two occasions, when he was engaged in carrying pipes and sand-papering a beer tank. The employee was undoubtedly hired because of the need of his services in connection with the work on the well; but as a brewery worker, receiving the pay of that grade of employment, he was required to do the other jobs referred to, and was expected to perform them under his contract of hire and in accordance with his status as a brewery worker, receiving a brewery worker's wages.

With reference to request No. 3, the committee has reported the material facts correctly, and there was no evidence to show that boiler pipes had not been removed before during the past twenty years. The committee has it that Kelly stated that "it was particular work and had never been done before," so far as he knew.

With reference to request No. 4, the evidence shows that no brewery worker, such as the employee Coyle was, received less than \$3 a day. He was a brewery worker, performing work similar to that of other brewery workers, and the fact that he was employed mainly in digging a well for the brewery, and that no other brewery worker had been employed in digging a well for an entire year preceding the date of his injury, is not material. The subscriber required his services as a brewery worker, and paid him the minimum wage of \$18 weekly for that service, and had he been employed for a full year his average weekly wage would have been at least that sum. Other brewery workers, of the same grade, working for the same subscriber, earned an average weekly wage of \$18, which was the average weekly wage of the deceased.

CASE No. 799.

ORA S. STONE, MOTHER OF ORRINGTON L. STONE (DECEASED),
Employee.

WALKER ICE COMPANY, *Employer.*

TRAVELERS INSURANCE COMPANY, *Insurer.*

MOTHER OF FATALLY INJURED EMPLOYEE, WHO LIVED APART
FROM HIS WIFE, ENTITLED TO COMPENSATION AS A PARTIAL
DEPENDENT.

The employee had been separated from his wife for a period of eighteen months prior to the occurrence of the injury which caused his death, and he had not during that period contributed to her support. He lived with his mother and contributed \$5 weekly to her. She was partially dependent upon him, another son assisting to support her.

Held, that the mother was partially dependent.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Ora S. Stone, mother of the deceased, *v.* Travelers Insurance Company, this being case No. 799 on the files of the Industrial Accident Board, reports as follows:—

The arbitration committee, consisting of James B. Carroll of the Industrial Accident Board, chairman, Fred W. Cronin, rep-

representing the dependents of the deceased, and Rowland J. Hastings, representing the insurer, heard the parties in Committee Room No. 30, City Hall, Worcester, Mass., on Tuesday, April 7, 1914, at 2 P.M. Orbid W. Blackwell, Esq., appeared as counsel for the dependents, and Daniel Gay appeared for the insurance company.

Orrington L. Stone was employed by the Walker Ice Company and lived with his mother and his sister, contributing \$5 a week for the support of the household. It was stated at the hearing, and agreed to, that the employee left a widow, but that his widow had not lived with him for some time prior to his death, and that she was not dependent upon his wages for support.

The evidence was substantially as follows:—

Mr. Stone, brother of the deceased, testified: —

My mother has some rooms with me; that is, I have a house and I let her have two rooms. Before my brother's death, he lived with my mother and sister. I could not contribute much to my mother's support, excepting to give her free rent, because I did not make big pay. During the last year my brother worked six months for the Coes Wrench Company, and was earning \$9 a week. He was idle then about two months before he got work with the Walker Ice Company. Out of this two months, however, he worked about ten days up at Indian Lake. When he was working he paid my mother \$5 a week. When he first came to live with her he was sick, so could not do much of anything, but he used to help her around the house and gave her \$3.50 a week. He told me that his wife threw him out of the house, so he came to live with mother. He has been living with mother for the last year and a half. His wife came with him to the house once, and she told me at that time that they had only separated for a little while, and that they were going to live together again. She did not go to the hospital to see him, nor did she attend his funeral. I never heard anything from her since the time she was at the house. My brother told me that his wife was going to New York with her daughter. During the last year he did not send her any money, nor did she send him any, as far as I know. He said he saw her once on the car, but she never noticed him. My sister is rather delicate, so the money my brother gave helped to support her too. She works for the New England Corset Company and earns around \$2 a week, and out of that she has to pay her car fare back and forth to work. She is not well, so cannot work steadily.

On this evidence we find that the mother was partially dependent upon the wages of her son Orrington for support, and it was agreed that the amount of her dependency was \$2.25 a

week, and we find that she is entitled under the act to be paid \$2.25 a week for a period of three hundred weeks from the date of the injury, Feb. 6, 1914.

JAMES B. CARROLL.

FRED W. CRONIN.

ROWLAND J. HASTINGS.

CASE No. 800.

THOMAS HANLON, *Employee*.

RITER-CONLEY MFG. COMPANY, *Employer*.

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, Ltd., *Insurer*.

EMPLOYEE ENTITLED TO COMPENSATION WHILE INCARCERATED
IN JAIL. TOTAL INCAPACITY FOR WORK CONTINUED DURING
THE PERIOD OF CONFINEMENT.

The employee received a serious injury to his foot, and was afterwards sent to the State Farm because of overindulgence in intoxicants. The only question at issue was whether or not he was entitled to compensation during his stay in jail. The evidence showed that the employee was totally incapacitated by reason of the injury during the time of his sentence at the State Farm.

Held, that the employee was entitled to compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Thomas Hanlon v. Employers' Liability Assurance Corporation, Ltd., this being case No. 800 on the files of the Industrial Accident Board, reports as follows:—

The committee of arbitration, consisting of James B. Carroll of the Industrial Accident Board, chairman, William I. McLaughlin, State Mutual Building, Worcester, Mass., representing the employee, and Edwin H. Crandell, 340 Main Street, Worcester, Mass., representing the insurer, heard the parties and their witnesses at Room 30, City Hall, Worcester, Mass., on Monday, April 13, 1914, at 2.30 p.m. Frank L. Riley of Worcester appeared for the insurer as counsel. The employee was not represented by counsel.

The question involved in this case is this: Is the employee entitled to compensation on account of total incapacity for work for the period during which he was confined at the State Farm because of drunkenness?

He was sentenced to the State Farm Oct. 30, 1913, for a three months' period. He was injured on Aug. 26, 1913, and compensation was paid him up to Nov. 22, 1913. His average weekly wages were \$12. It is agreed that he is entitled to compensation from the 29th of January, 1914, to the 18th of February, 1914.

Dr. Richard J. Shannahan of Worcester testified: —

I saw Hanlon on the 30th of January, 1914, the day after he was released from the State Farm. His foot at that time was swollen and very painful, and he was unable to do any kind of work. He remained home until the 18th of February, when he went to work for the city, shoveling snow. He worked five days, and his leg was greatly swollen at the end of that time, and I advised him to get off the foot for a week or two and rest it up. He did this and then was looking around to get work again. His leg became very sore and painful, and he had to go to the City Hospital for treatment. At the present time he is at the City Hospital, and is now incapacitated for work. We had an X-ray taken at the City Hospital by Dr. Cook, which showed a flattening of the arch in the anterior portion of the foot. This is due to the injury he received. In my opinion the employee will be all right in two or three months. He is not now totally incapacitated. When he came back from the State Farm his leg had been painted with iodine, which showed he had evidently been receiving some kind of treatment in the institution.

Dr. Curran of the City Hospital is at present caring for Hanlon. He said: —

We are about to put arches on Hanlon. To-day we are having pads cut to shape the foot. These pads are made of felt which shape to the arch and hold up the bones. After he wears these a short time he will have steels made to support his foot. Then he will be able to get along.

The evidence shows that the employee was totally incapacitated for work by reason of the injury and independent of his confinement at the State Farm. *Harwood v. Wyken Colliery Co., Ltd.*, 6 B. W. C. C. 225.

The committee of arbitration finds that Thomas Hanlon, the employee, was totally incapacitated for work as a result of the

injury received by him on Aug. 26, 1913, to April 13, 1914, the date of the hearing, said total incapacity continuing, with the exception of five days during which he earned the rate of wages received by him at the time of the injury, to wit, \$12; that there is due the said employee a weekly compensation of \$6 dating from Nov. 22, 1913, the date upon which compensation was suspended, to April 13, 1914, less five days; that is, compensation for a period of nineteen and five-sevenths weeks, or a total of \$118.29.

This decision and all findings regarding compensation or the existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III., of the Workmen's Compensation Act, and the general provisions of said act and its amendments.

JAMES B. CARROLL.

WILLIAM I. McLAUGHLIN.

EDWIN H. CRANDELL.

CASE No. 819.

ELIZA PELOQUIN, WIDOW OF LOUIS PELOQUIN (LOUIS FELIX)
(DECEASED), *Employee*.

RITER-CONLEY MFG. COMPANY, *Employer*.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *Insurer*.

WIDOW WHO HAD BEEN SEPARATED FROM HER HUSBAND RETURNED TO HIM AND HAD BEEN LIVING WITH HIM EIGHT DAYS PREVIOUS TO THE OCCURRENCE OF THE FATAL INJURY. COMPENSATION AWARDED.

The employee and his wife had been estranged for a period of about four months prior to the date of the fatal injury which caused his death. A reconciliation had been effected, however, shortly before said fatal injury, and husband and wife were living together for a period of eight days before he died. He had been working only two days when he received the injury which killed him.

Held, that the widow was conclusively presumed to be wholly dependent and entitled to compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Eliza Peloquin, widow of Louis Peloquin (Louis Felix), v. Fidelity and Deposit Company of Maryland, this being case No. 819 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of James B. Carroll of the Industrial Accident Board, chairman, Frank R. L. Riley, 340 Main Street, Worcester, Mass., representing the dependents of the deceased, and Addison M. Goldsmith, 14 Park Road, Winchester, Mass., representing the insurer, heard the parties and their witnesses in Committee Room No. 30, City Hall, Worcester, Mass., on Friday, April 17, 1914, at 10 A.M. John H. Reid, 340 Main Street, Worcester, Mass., appeared for the widow, and Albin Richards, 53 State Street, Boston, Mass., appeared for the insurer as counsels.

The question in this case is one of dependency. Were Mr. and Mrs. Peloquin living together as man and wife at the time of the injury? Louis Peloquin's average weekly wage was \$27.

Mrs. Eliza Peloquin testified: —

I was married to Louis Peloquin on the fifteenth day of September, 1902, in the French Catholic Church, and have five children, all boys. Four of them are now in the orphanage, and the baby is boarding with my brother-in-law. There was a time that Louis and I did not live in the same house, but that was because of his hard life. He was a hard drinker and caused a lot of family trouble. He went away down and under and did not have courage to fight it out. Finally, there were hard words between us and I had to go to work. This was three years ago. My husband went to work then on the New Haven Railroad as a freight conductor. He left this job without a leave of absence, and when he came back he had lost it. He went to New Haven and got a job as railroad brakeman. He used to come home once in three weeks or once a month. I was keeping house all this time. He did what he could for my support, but he had to pay his own board and lodging out of his earnings. This continued until a year ago last May. He came back and was not working, and said he was going to start all over again. We had a falling out, and he said he was going away to do better, and when he did well he would return to me. I broke up housekeeping last September. His father took four of the children and I kept the baby. His father

got after him and he came home and then put the children in the orphanage and paid their board. At this time he was railroading at different places. Every time he came to Worcester he came to see me. When he came back to Worcester the last time, it was Saturday morning, eight days before he was killed. He came to Worcester in the morning and called me up and asked me if he could see me. I told him I was busy, but would see him at 5 o'clock. I was working at this time. I met him that evening at the Union Station in Worcester, and we went to his brother's house. The Sunday before I had been up to the orphanage to see the children, and heard that their board was in arrears three months, so I knew I had to get after him. He told me he was going away to get a good position, and I told him I was not going to let him go any more unless I went with him. He said if I would take him back it would be all right. He said he could get a position at Riter-Conley's. I stayed right there at his brother's house with him up to the time of his death, and we enjoyed ourselves together as if nothing had happened. We decided that I would still work, and when we got enough, to start in and keep house. He loafed all that week and Saturday morning went to work for Riter-Conley. He was killed on Monday afternoon. At this time he was making \$4.50 a day. For the week we were with his brother he paid him \$8 for his and my board. My father-in-law put in a claim for the children because he thought I was not going to file claim.

Joseph Peloquin, brother of the deceased, testified: —

Louis and his wife came to my house on this Saturday, eight days before he was killed. I knew that they were going to save up their money and go back housekeeping. In the meantime, they were going to stay at my house. They were to give me \$8 a week. They were to take the children just as soon as they started housekeeping. They were going to try to pay the children's back board. He told me he was earning \$4 or \$4.50 a day. He went to work for Riter-Conley on Saturday, and Monday got hurt, dying Tuesday morning. Louis paid me the \$8 board. He had been working on the Boston & Maine before he came to my house, and paid me out of the money he had earned at this time. They both occupied the same room at my house. At this time there was a complete reconciliation.

Mrs. Jennie Cloutier, wife of Eliza Peloquin's brother, testified: —

Eliza had been living with me about a week or two before her husband called her up on the 'phone one Saturday. She said she was going to meet her husband at 5 o'clock. I did not see her again until the following Monday. She came to my house for dinner, and told me she had met her husband and that they had made up and were going back together

and would do the best they could. They were going housekeeping as soon as possible. She did not come back to live with me. She called on me again a week from that Monday and said she would bring her clothes home. She packed her case, and with another sister-in-law went in to the "pictures." After supper she 'phoned me that her husband had got hurt and was in the hospital. She stayed with him until he died.

On this evidence we find that the widow, Eliza Peloquin, was living with her husband, Louis Peloquin (*alias* Louis Felix), under section 7 (a), Part II., at the time of his death, and that she is entitled to compensation at the rate of \$10 a week for a period of three hundred weeks from the date of the injury, Jan. 26, 1914.

JAMES B. CARROLL.

FRANK R. L. RILEY.

ADDISON M. GOLDSMITH.

CASE No. 821.

HARRY C. JONES, *Employee*.

COMMONWEALTH OF MASSACHUSETTS, *Employer*.

COMMONWEALTH DECLINES TO PAY COMPENSATION ON GROUND
THAT THE EMPLOYEE WAS AN INDEPENDENT CONTRACTOR.
COMMITTEE FINDS THAT HE WAS A MECHANIC AND AWARDS
COMPENSATION.

The employee, a lather, was engaged to work at the Westfield State Sanatorium to put on laths, at the price of 25 cents a bunch. He worked alone at first, and then obtained other men from the union to aid him in the work, paying them the same rate of wages. All the work was done under the direction of the foreman.

Held, that the claimant was a mechanic and entitled to compensation.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Harry C. Jones v. Commonwealth of Massachusetts, this being case No. 821 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of James B. Carroll of the Industrial Accident Board, chairman, Richard A. Hen-

nessey, 65 Alden Street, Springfield, Mass., representing the employee, and John F. Casey, 6 Beacon Street, Boston, Mass., representing the Commonwealth of Massachusetts, heard the parties and their witnesses on Tuesday, April 14, 1914, at 2 P.M., in the Town Hall, Westfield, Mass. The employee and the Commonwealth were not represented by counsel. Dr. Henry D. Chadwick represented the Commonwealth.

It was contended on behalf of the Commonwealth that Jones was an independent contractor. The employee contended that he was a "laborer, workman or mechanic" employed by the Commonwealth within the meaning of the Workmen's Compensation Act as amended by chapter 807, Acts of 1913.

Harry C. Jones testified: —

I started to work at the Westfield State Sanatorium on Dec. 8, 1913, and was injured on the 17th of January, 1914. The foreman on the job, Mr. Zeno, hired me to put on laths at 25 cents a bunch. A new building was being erected. If I was a contractor I would get 27 cents a bunch; 25 cents a bunch is regular journeymen's wages. All the wages were given to me in one envelope. I am not a contractor. I worked two days alone and then told Mr. Zeno I would get some men from the union to help me out, and made arrangements to pay them 25 cents a bunch, the same as I was getting. I brought two men the first week and the next week another man. I had to do this work exactly as the foreman, Mr. Zeno, told me to do it. It was all done under his direction. He had carpenters around me doing patching, and if I was a contractor this would not happen. Everything was furnished me. On an average I received \$4 a day. On Jan. 17, 1914, I was going out for a bunch of laths, and when I was walking along I stepped on a piece of wood and fell with the bunch of laths, and a nail went in my knee. Dr. Smith of Springfield attended me and his bill for the first two weeks was \$30. I was in the Wesson Hospital for three weeks, but laid up nine weeks. The bill for the three weeks in the hospital was \$45.90. When I got injured I was out of my head for a whole week. When I went back to the sanatorium for my money I told the foreman that I was sick, and that I had run a nail in my knee and had been in the hospital.

John H. O'Hara testified: —

Mr. Jones told me there was a job over near Westfield and wanted to know if I would not go over and help him out with it. He did not tell me then how much he would pay me, but I knew what I was going to get before I went to work. My pay came with Jones's, and this is usual in my work. I never considered Jones at any time as a contractor, but

always considered him as a foreman. There is a difference between a boss and a foreman. Jones received the same wages as I got, 25 cents a bunch. I am a member of the union. If Jones had a contract job he would have to make an agreement with the union. Mr. Zeno did not give me any orders. The only thing I saw about him was when I first came he stood and watched me fifteen or twenty minutes. I kept account of my own work, and at the end of the week I knew how many I had done, and gave in my account and got my money.

Mr. Zeno testified: —

I am foreman of construction at the Westfield State Sanatorium. I am not a contractor. Dr. Chadwick, superintendent of the sanatorium, hired me. We were building a children's ward. I hire all the men, have full control, authority and direction over the work of the men, and fix the price. Jones came to me and wanted a job at lathing. I asked him what he would do it for and he said 27 cents a bunch. I said I could not pay this price, but would pay him 25 cents a bunch, and he decided to work for that. He said he would do it right away. I told him we did not want to linger, and if he could do it right away he could have the job. I understood he was a contractor in lathing and hired his own men. I gave orders to him and he gave the orders to his men. He would come to me and tell me how many bunches he had on and I would pay him for the whole amount. The day he went home he was sitting near the fire and said it was too cold to work. I told him it would be a week before we could get the heat into his building, so he said he would be back the next week. When he did not come back I telephoned several places for him, but could not find him, so put more men on the job to finish it. Then in about ten days he came and said he had fallen down outside around the building and a nail had run into his knee and blood poisoning had set in. We did not know about this until then. I asked him why he did not notify us, and he said he had sent me a postal, but I never got it. I did not know anything about this Compensation Act. I was out of the State a short time. I pay union wages and work the men union hours.

We find, on this evidence, that Jones was a mechanic employed by the Commonwealth, and was not a contractor; that the foreman of the job, Mr. Zeno, had the right to direct as to when, how and in what manner he was to do his work, and he did on one or two occasions direct him in the way in which the work should be done; and that the employee is entitled to the sum of \$24.52 hospital services, \$3 for ambulance fee and \$30 for doctor's fee, aggregating a total payment of \$57.52

for medical and hospital services during the first two weeks after the injury, and to compensation for a period of seven weeks, that is, from Jan. 31, 1914, the fifteenth day after the injury, to March 21, 1914, at \$10 a week, amounting to \$70.

This decision and all findings regarding compensation or the existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III., of the Workmen's Compensation Act, and the general provisions of said act and its amendments.

JAMES B. CARROLL.

RICHARD A. HENNESSEY.

JOHN F. CASEY.

CASE No. 827.

JOHANNA LOWNEY, WIDOW OF JOHN LOWNEY (DECEASED),
Employee.

CITY OF NEW BEDFORD, *Employer.*

WIDOW OF STREET SWEEPER FATALLY INJURED BY RUNAWAY
HORSE ENTITLED TO COMPENSATION. MUNICIPALITY TAKES
CASE TO SUPREME JUDICIAL COURT.

The employee, a street sweeper, was fatally injured by a runaway horse while in the performance of his work as a street sweeper in the employ of the municipality, which had voted to accept the provisions of the Workmen's Compensation Act. His duties caused him to be especially exposed to the risks and dangers of the street. It was the said employee's duty to sweep certain sections of the public highway, and to perform this duty it was necessary that he traverse it regularly and systematically. While so doing a runaway horse collided with and killed him.

Held, that the employee was fatally injured in the course of his employment, and that his widow was entitled to compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Johanna

Lowney, widow of John Lowney, v. City of New Bedford, this being case No. 827 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Dudley M. Holman, representing the Industrial Accident Board, chairman, Joseph R. Glennon of 679 Cottage Street, New Bedford, Mass., representing the widow of the employee, and Leland C. Peirce, Esq., of 10 Masonic Street, New Bedford, Mass., representing the city of New Bedford, heard the parties and their witnesses in the Aldermanic Chamber, City Hall, New Bedford, Mass., on Tuesday, April 28, 1914, at 11 A.M. Benjamin B. Barney appeared for the city, and the widow was not represented by counsel.

It was agreed that the average weekly wages of the employee were \$13.50; that he was a regular employee in the street department, — the street sweeping division.

It appeared in evidence in the testimony of Daniel S. McCarthy that McCarthy was going north on Pleasant Street on March 4, 1914, in a motor car belonging to the gas company, when he noticed a runaway horse coming down the street. It was then probably 20 or 30 feet in front of his machine. He noticed the street sweeper spring out from in front of the horse; "the street-sweeping cart was in the gutter, and he was on the left-hand side of the cart, and the horse was almost on top of him, and the only thing in my mind that he might have done was to raise his pick, which he did, because he did not have a chance to jump to the gutter — the cart was in his way; the horse would get him anyway, so he raised his pick to stop him from getting hurt, and just at that moment I think the horse knocked him backwards and went over him. After he got knocked over Mr. Sargent and I jumped out of the machine, and took him into Dr. Lowney's office, and then the ambulance came after him and I went back on my job." On cross-examination by Mr. Barney, city solicitor of New Bedford, McCarthy placed the time somewhere between 2 and 3 o'clock. He was going north and the runaway was coming south. He saw the horse attached to the wagon collide with the man. With reference to the collision, he was about 10 feet behind, to the south. When the horse struck the man he didn't notice what happened to the horse and wagon after the

collision. He saw Mr. Lowney knocked down, and lost all interest in the horse and team. It was a light express wagon and belonged to a Mr. Ashley.

James Edward Sargent testified that while sitting in the automobile he heard this cry of a runaway. He jumped, naturally, and looked to the east and saw this horse just dash by, the horse and wagon. He jumped out and saw this man lying on the road. The first thing he thought of was the doctor, and he knew Dr. Lowney's office was across the street, so he said to McCarthy, "Pick him up and bring him in to the doctor." Sargent took him by the head and Mr. McCarthy took him by the feet and carried him into the doctor's office, where he was kept until the ambulance arrived. When he saw the man he was stretched out on the road. His head was on his arm; he didn't know how he was struck. The only thing he saw of the horse was when he heard the cry of "Run-away!" When he jumped, the horse flashed past him as fast as he could go. "I did not actually see the collision between the runaway horse and the man who was sweeping the streets."

John H. Hoyle testified that he is a street sweeper in the street department, but he was not working that day. He went to the hospital in the ambulance which took Mr. Lowney to the hospital. "It was three minutes to 2" at that time, and Hoyle picked up Mr. Lowney's tools and locked them in his cellar and put his wagon away. Lowney was using a pick that day picking ice; they were sweeping and picking at the same time; the ice was about 2 feet out in the gutter.

Johanna Lowney testified that John Lowney was her husband; that he was employed by the city of New Bedford as a street sweeper; and that she was married to him forty years.

Dr. Lowney testified as follows: —

The man was brought into my office and I happened to be in the office that day, and I heard some yelling outside, and when I looked out the window I saw this man lying on the street. Two or three fellows brought him into the office and laid him on the floor. I saw the horse going over him. I do not think that the team to which the horse was attached was a city team. He was removed from my office to St. Luke's Hospital. He died from a fracture at the base of the skull.

We find, therefore, on all the facts in the case, that John Lowney, while about his employment as a member of the street department of the city of New Bedford, received an accident which arose out of and in the course of his employment; that his employment took the man into the street, so that the ordinary risks of the street were risks incidental to his employment, and that he was more exposed to the risks of the street than the ordinary member of the public.

We find that the widow is entitled to compensation at one-half the average weekly wages of her husband, John Lowney, and that the agreed average weekly wages being \$13.50, she is entitled to recover \$6.75 for a period of three hundred weeks from the date of the accident.

DUDLEY M. HOLMAN.

JOSEPH R. GLENNON.

Leland C. Peirce dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room of the Industrial Accident Board, New Albion Building, Boston, Mass., on Wednesday, July 1, 1914, at 2.45 P.M., and affirms and adopts the findings and decision of the committee of arbitration.

The evidence shows that the employee, John Lowney, was fatally injured by a runaway horse while in the performance of his work as a street sweeper in the employ of the city of New Bedford. A widow, Johanna Lowney, who resided with him at the time of his death, survives. The city of New Bedford had accepted the provisions of chapter 807, Acts of 1913, and is therefore required to pay compensation as provided by the Workmen's Compensation Act to all "laborers, workmen and mechanics" receiving personal injuries arising out of and in the course of their employment, and to their dependents, if said personal injuries result fatally.

The city of New Bedford, through its counsel, Benjamin B. Barney, Esq., agreed that the personal injury was received

"in the course of" the employment of the deceased, but claimed that it did not "arise out of" said employment, on the ground that an injury to a street sweeper by a runaway horse was not a natural incident of his employment.

The Board finds that the duties of the employee, the said John Lowney, caused him to be especially exposed to the risks and dangers of the street. It was the said employee's duty to sweep a certain section of the public highway; to perform this duty it was necessary that he traverse it regularly and systematically; all the dangers and risks of the street, such as the risk and danger of being run over or injured by bicycles, street cars, automobiles and runaway horses, were incidental to his employment; and the personal injury received by reason of the running away of a horse on March 4, 1914, arose out of and in the course of said employment. *Pierce v. Provident Clothing & Supply Co., Ltd.* (1911), 4 B. W. C. C. 242; *McNiece v. Singer Sewing Machine Co.* (1911), 4 B. W. C. C. 351; *Refuge Assurance Co. v. Miller* (1912), 5 B. W. C. C. 522; *Sanderson v. Henry Weight, Ltd.* (1914), 110 L. T. 517.

The Board finds that there is due the widow, Johanna Lowney, the sum of \$6.75 weekly for a period of three hundred weeks from the date of the injury, March 4, 1914, from the city of New Bedford.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 828.

JOHN SWARTZ, *Employee.*
GEORGE A. FULLER COMPANY, *Employer.*
CASUALTY COMPANY OF AMERICA, *Insurer.*

BRONCHITIS AND INTESTINAL TUBERCULOSIS HAVE NO CAUSAL
RELATION WITH PERSONAL INJURY ARISING OUT OF AND
IN THE COURSE OF THE EMPLOYMENT.

The employee received a personal injury arising out of and in the course of his employment by reason of a fall of 10 feet, the evidence tending to show that he struck on his left arm near the elbow, and that he afterwards felt, in addi-

tion to trouble in the arm and shoulder, a soreness in the left side of the chest. Later, a condition of bronchitis and intestinal tuberculosis developed which caused incapacity for work beyond the date to which compensation had been paid.

Held, that the employee was not entitled to compensation on account of the condition of bronchitis and intestinal tuberculosis.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to Supreme Judicial Court.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of John Swartz v. Casualty Company of America, this being case No. 828 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of David T. Dickinson of the Industrial Accident Board, chairman, Michael F. Clarke, representing the employee, and Clinton L. Bancroft, representing the insurer, being duly sworn, heard the parties and their witnesses at the Hearing Room of the Industrial Accident Board, Wednesday, May 13, 1914, at 2 P.M., Tuesday, June 2, 1914, at 10 A.M., and Saturday, June 13, 1914, at 10 A.M.

This employee on Sept. 25, 1913, received an injury arising out of and in the course of his employment. While working as an assistant mason he fell a distance of about 10 feet. There was evidence tending to show that he struck on his left arm near the elbow, and that he afterwards felt, in addition to trouble in the arm and shoulder, a soreness in the left side of the chest.

His average weekly wages at the time of the injury were \$16.80.

He was paid compensation by the insurer at the rate of \$8.40 a week to Dec. 18, 1913, when it was stopped on the ground that incapacity had ceased. The employee was not present at the hearing on May 13, 1914.

His physician, Dr. Walter D. Shurtleff, testified that the employee was unable to attend on account of his physical weakness and incapacity; that he had treated the employee, as his physician, from March 27, 1913, to May 12, 1914; that when

he last examined him on May 12, the pains which he was suffering from had shifted from the left side of the chest to the right side, so that the principal trouble was on the right side; that the trouble which was then, May 12, disabling him was bronchitis; and that this bronchitis was due to the injury resulting from the fall sustained on September 25. He also testified that the employee during the time which he had attended him had spit some blood, but that this had ceased by March 27, 1914. He also testified that the employee was suffering from exhaustion of vitality, and that following the injury he had suffered some shock to the nervous system, and had been able to do no work since the injury.

Dr. John Sutherland, called by the employee, testified on May 13, 1914, substantially that he had first examined him on Sept. 26, 1913, and then found some injury to the pleura. He had then complained of some pain and of spitting up blood, which he continued to do to some extent until Oct. 7, 1913. After this date he was getting along pretty well, and that he, the doctor, continued to treat him until Nov. 24, 1913, when he was pretty weak and feeble, and his vitality much lowered. He had been in bed on account of the injury from Sept. 26 to Oct. 7, 1913. He had one or two scars on the arm. The doctor further testified on June 2, 1914, that he had examined the employee on Sept. 26, 1913, for the presence of tuberculosis, using the percussion and auscultation test, and that he found no signs of the existence of tuberculosis. He made no examination of the sputum. He further testified that the employee had told him that the place where he struck his left chest when he fell was at or just below the breast.

John Swartz, the employee, testified that he was injured by falling from a staging, and that he fell a distance of about 10 or 12 feet; that the plank fell to the ground at the same time with him, and that he struck his left breast against the edge of this plank when he came to the ground. The plank was about 6 inches wide and 2 inches thick, and the edge which he struck was the side measuring 2 inches. He pointed several times to the place where his body struck the edge of this plank, indicating a place at or slightly below his left breast.

Dr. William P. Hammond, called by the employee, testified

that he examined him on May 31, 1914, and found no evidence of tubercular trouble about the lungs or in any part above the diaphragm, but that he found the glands of the bowels very much enlarged and tubercular, and that there were four or five of these enlarged glands about the size of a turkey's egg, and that their normal size was about the size of a bean or pea; that the employee complained that if he undertook to do anything he was taken with a pain in the bowels, which the doctor attributed to the swollen glands; that there was probably a state of inflammation in these glands; that he had understood that the part of the employee's body which struck against the plank when falling was across the abdomen, and that if this were so, such a blow, in his opinion, would have probably caused inflammation to have started in these glands and to have produced their present enlargement and trouble; but that if the blow was near the left breast, it might have so weakened the general strength and vitality of the employee as to have enabled a pre-existing tubercular tendency of the bowels to have developed in the glands, as now appears. He testified, however, that if the employee had recovered his general strength sufficiently to undertake his former labor as assistant mason in March, 1914, except for a local strain in the left shoulder, and he had then been afflicted thereafter with bronchitis, he would attribute his later lessened power of resistance and the ensuing enlargement of the glands of the bowels to the bronchitis and not to the injury. In his opinion the glands of the bowels might have been enlarged to about their present size before the injury, although they apparently were not paining the employee at that time, nor in a state of inflammation as they now appeared to be.

Dr. Frank E. Allard, called by the insurer, testified that he had examined the employee on Nov. 20, 1913; that the only mark of an injury he discovered was a small mark down by the elbow, fully healed; that the action of the muscles of the left arm and side were not disturbed; that the employee then claimed to be suffering pain in the left side, coughing considerably, and had bronchitis well marked, which in his opinion had nothing to do with the accident; that he had also a complication of the lungs, which in his opinion had nothing to do

with the accident; that he also had a consumptive appearance; that he found an old, small hernia which had no connection with the injury; that the spine was not perfectly straight, due to its natural formation; and that the employee was a man who had a weak body, which looks as though he had not been well for a good while. His lungs and heart were negative. He also found no trouble with the pleura.

The report of Dr. Francis D. Donoghue, appointed as an impartial physician to examine the employee, dated Dec. 9, 1913, was received in evidence. It appeared from this report that the employee had felt physically well enough the week before to undertake his former work as assistant mason, but found, on so doing, that his condition prevented his carrying the weight of a hod of bricks on the left shoulder. On this December 9, Dr. Donoghue examined the employee, including the condition of this shoulder, and found that, in his opinion, he would be able to perform his former work within two or three weeks thereafter; that the power of motion of his arm and body was normal; that the muscles in his left shoulder pained him some, but no condition of bronchitis was observed; that he had received a severe muscular wrenching; and that he would probably complain of his shoulder for some time.

The testimony of certain fellow workmen and friends of the employee was introduced showing that he had been a hard and steady working man for a good many years before this injury, doing general laborers' work during such time; that he was exceptionally tall, slender, light in weight, and did not have the appearance of having a strong physical constitution. No further medical examination of the employee and report thereon, or as to the condition of the employee before and after the injury, were made or introduced in evidence.

The committee therefore finds, on the weight of the evidence introduced, that the employee was not suffering from bronchitis when he was examined by Dr. Donoghue on Dec. 9, 1913; that his present condition of bronchitis and intestinal tuberculosis which incapacitated him for work is not a result of the injury; that incapacity resulting from the injury did not continue after Dec. 18, 1913, the date to which the insurer has

paid him compensation; and that he is not entitled to further compensation.

DAVID T. DICKINSON.
CLINTON L. BANCROFT.

Michael F. Clarke dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, New Albion Building, Boston, Mass., Thursday, Sept. 3, 1914, at 9.30 A.M., and affirms and adopts the findings and decision of the committee of arbitration.

JAMES B. CARROLL.
DAVID T. DICKINSON.
JOSEPH A. PARKS.

CASE No. 833.

VICTOR JACKSON, *Employee.*

R. B. MASON COMPANY, *Employer.*

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., *Insurer.*

Dr. JOHN MALONE, *Physician.*

AVERAGE MINIMUM FEES FOR FIRST AID AND OFFICE TREATMENTS.

The employee received a personal injury by reason of the entrance of a wooden sliver or splinter into the palm of his left hand, and was given necessary medical treatment by his family physician, who rendered a bill calling for a fee of \$5 for first aid and \$2 for office treatment, with surgical dressings. The evidence showed that the fees for first-aid medical service, in the locality in which the treatment was given, ranged from \$2 to \$5, and for office visits with surgical dressings, from \$1 to \$2.

Held, that the bill of the physician was reasonable.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board, revising the findings of the committee of arbitration, finds that \$3 for first aid and \$1.50 for office dressings are reasonable fees in the locality in which the service was rendered, under the Workmen's Compensation Act.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments

thereto, having investigated the claim of Victor Jackson v. Employers' Liability Assurance Corporation, Ltd., this being case No. 833 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of David T. Dickinson of the Industrial Accident Board, chairman, Wendell P. Murray, representing the employee, W. Lloyd Allen, representing the insurer, being duly sworn, heard the parties and their witnesses at the Hearing Room of the Industrial Accident Board, Friday, May 15, 1914, at 2 p.m. John M. Morrison appeared as counsel for the insurer.

This was a claim for reimbursement for medical expenses incurred by the employee for services rendered him as a result of an injury arising out of and in the course of his employment, said medical services having been furnished within the first two weeks after the injury.

The injury consisted of a wooden sliver or splinter that had been forced into the palm of the employee's left hand at an angle of about 75° and to a depth of one-half to three-quarters of an inch.

Dr. John Malone testified, explaining the services rendered in the removal of the splinter and to nine subsequent treatments at his office at which the employee called; and that in his opinion \$22 was a reasonable charge therefor. He testified that in his opinion there was danger from tetanus, and that his treatment was to guard against that danger.

The committee finds that the wound was a slight one, and that in view of all the facts the sum of \$11, which Dr. Malone has already been paid for his services, is a reasonable payment therefor, and that no further sum is due from the insurer.

DAVID T. DICKINSON.
W. LLOYD ALLEN.

Wendell P. Murray dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, New Albion Building, Boston, Mass., Wednesday, June 24, 1914, at 2 P.M., and revising the report of the committee of arbitration finds and decides as follows:—

The Board finds, upon careful investigation of the fees charged in the district in which the services of the physician, Dr. John Malone, were rendered, that the fee for first-aid medical service varies from \$2 to \$5, and for office visits with surgical dressings from \$1 to \$2.

The Board therefore finds, in accordance with the thirteenth recommendation of the medical advisory committee, "that in a given accident the fee paid by the insurance companies for services should not be less than the average minimum fee for similar services in the locality in which said services are rendered;" that \$3 is the "average minimum fee" for first-aid attention, and \$1.50 the "average minimum fee" for office visits with surgical dressings in the locality in which the said physician, Dr. John Malone, practices.

The said physician gave first-aid attention to the employee, Victor Jackson, and rendered surgical services at his office on nine subsequent occasions, dressing the injury each time, and the Board finds that there is due said employee the sum of \$16.50 from the insurer, the Employers' Liability Assurance Corporation, Ltd., on account of the services rendered by the said physician, less a payment of \$11 which has already been made, the net amount due being \$5.50.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
EDW. F. MCSWEENEY.

CASE No. 833.

MABEL PHELAN GRON, ALLEGED WIDOW OF SAMUEL GRON
(DECEASED), *Employee*.

BOSTON & WORCESTER STREET RAILWAY COMPANY, *Employer*.

MASSACHUSETTS EMPLOYEES INSURANCE ASSOCIATION, *Insurer*.

CLAIMANT WHO CONTRACTED TO MARRY EMPLOYEE, AND WHO
BELIEVED THAT SHE HAD BEEN LEGALLY MARRIED TO HIM,
NOT ENTITLED TO COMPENSATION.

The claimant, alleging to be the widow of the employee, entered into a ceremony of marriage with the employee, in good faith, and believed that she was honestly marrying him by reason of the ceremony. The evidence showed, however, that said alleged marriage was not performed with due legal ceremony, and that the person who performed same was not authorized to solemnize marriage.

Held, that the claimant was not a dependent under the statute.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Mabel Phelan Gron, alleged widow of Samuel Gron, v. Massachusetts Employees Insurance Association, this being case No. 838 on the files of the Industrial Accident Board, reports as follows: —

The arbitration committee, consisting of James B. Carroll of the Industrial Accident Board, chairman, Frederick A. Carroll of Worcester, representing the insurer, and James F. McAuliffe of Wellesley Hills, representing the widow, heard the parties and their witnesses in the Board Room of the Industrial Accident Board, New Albion Building, Boston, Mass., on Wednesday, April 22, 1914, at 10 A.M.

Mabel Phelan Gron was married on the 6th of January, 1909, at Providence, R. I., to Edward Hegvig. She procured a divorce from him in Worcester on the 13th of March, 1912, and on the fourteenth day of April, 1912, at Providence, R. I., she and Samuel Gron, the employee, entered into what she supposed was a valid ceremony of marriage. She and Gron lived together as husband and wife from that time until the time of his death, which occurred on the twenty-ninth day of July, 1913,

while he was in the employ of the Boston & Worcester Street Railway Company.

The question in this case is whether she is a dependent and entitled to compensation, either as Gron's widow or as a member of his family.

The following are the General Laws of Rhode Island, chapter 243, sections 6, 7 and 8, which were in evidence at the hearing: —

SECTION 6. Any minister or elder of any religious denomination who shall be domiciled in the state, and who shall have registered his residence, the name of the parish with which he is or was last associated, if any, and the name of the religious denomination to which he belongs in the office of the town clerk of the town in which he resides (but in the City of Providence, in the office of the registrar of births, deaths and marriages), in a book to be provided for that purpose by the state, town or city, and shall have subscribed his name thereto, may obtain a license from such town or city clerk or registrar to join persons in marriage in this state. The fee for such license shall be one dollar.

SECTION 7. Every one who has been or is a minister of any society professing to meet for religious purposes or incorporated for the promotion of such purposes and holding stated and regular services and who has been ordained according to the customs and usages of such society shall be considered as belonging to a religious denomination, within the meaning of the preceding section.

SECTION 8. Every such minister or elder so licensed, and every justice of the Supreme or Superior Court, may join persons in marriage in any town in this state, and wardens of the town of New Shoreham may join persons in marriage in said town.

The public laws of Rhode Island in 1909, inclusive, were also introduced to show that these sections were in effect and unchanged April 14, 1912, the date of the alleged marriage.

Mabel Phelan Gron testified substantially as follows: —

I knew Samuel Gron six months before I was married. The marriage took place in Providence, and the ceremony was performed by a Mr. Williams. I do not know what street Mr. Williams lived on, but it was near Westminster Street. I was married on April 14, 1912. My husband was working in Nashua at the time. He wrote me a letter telling me to go to Providence, which I did. I met Mr. Gron in the station at Providence. After I arrived at the station we went and had lunch, then went for a walk, after which we took a car that went up Westminster Street to the justice of the peace's office, and we were married in the afternoon. Before

we left the station we had some conversation about our getting married, but he did not say whether or not he had made any arrangements for our marriage. The house at which Mr. Williams married us was white with yellow trimmings. The room in which we were married was square and had in it two or three chairs, a writing table and a desk. There was nobody there when we were married but Mr. Williams, my husband and myself. My husband had no conversation with Mr. Williams except when I was there, and all he said was that we were to be married. My husband gave Mr. Williams the license, then he married us. During the ceremony, my husband held my hand while Mr. Williams read from the Bible, and married us. Then my husband put a wedding ring on my left hand. After we left Mr. Williams' house we took a walk around and then hired a room in a lodging house for a night. I do not know where this room was because I am not familiar with the streets in Providence. I had only been to Providence once before, and that was when I was married to Edward Hegvig. The day after I was married to Samuel Gron, I went to live with a Mrs. Gregory at the corner of Glenwood and Hammond streets, Worcester, and my husband came a few days later. He did not come back with me because he had to go back to Nashua on business. When he returned to Worcester, a few days after I did, he went to work at Sherers. We lived with Mrs. Gregory until we came to Boston. We had two rooms with Mrs. Gregory, a kitchen and a bedroom. After we left Worcester we went to live with a Mrs. Olin at 89 Intervale Street, Roxbury. We stayed with Mrs. Olin all during the Boston Elevated strike. We had only one room there. Then we went to live with a Mrs. Fraser at 27 Savin Street, Roxbury, where we lived until January, hiring one room. After we left Mrs. Fraser we went housekeeping at 4 Dunkled Street. While we were in Boston my husband worked for a man named Perry, worked in Gilchrist's, Shepard Norwell's, and for the Boston & Worcester Street Railway Company. We kept house from January to May and then went back to live with Mrs. Fraser on Savin Street. My husband was transferred to Westborough, so we went there, but found no rooms, so went to Worcester. My husband and I very often went out walking together, and when we would meet people my husband always introduced me as his wife. My husband gave me his full wages with the exception of the time he worked for the Boston & Worcester Street Railway Company, when he kept out \$5 each week, and I used the money he gave me to pay the household expenses. I ran an account with Gilchrist while I was here, but I do not owe them anything now. My former marriage to Edward Hegvig took place on the 6th of January, 1909, at Providence, R. I. This was the first time I had been in Providence, and I was not there again until the time I was married to Samuel Gron, and I have not been there since. These are the only two visits I ever made to Providence. I had one child by my first husband and he is with his father in Chicago at present. I got a divorce from my former husband on March 13, 1912, the grounds for same being "cruelty, nonsupport

and desertion." Two months before my divorce case was held I thought of getting married to Sam Gron. We did not make any arrangements, however, until Mr. Gron wrote from Nashua, N. H., telling me to meet him in Providence, and we would be married. He was waiting until he got a little money ahead. I had some talk with Sam Gron two months before I got the divorce, at which time he said that after I got the divorce we would be married. Between the time of this talk, two months before the divorce, and the time I received the letter from Nashua telling me to go to Providence, I had three or four talks with him, and I received one letter from him. The substance of these talks and this letter was that he was waiting until he had money enough ahead to be married. I received the letter from Samuel Gron, telling me to go to Providence, about 5 o'clock on Friday afternoon, and I wrote back, general delivery, telling him that I would be there. I met him in Providence on Sunday morning. When I met my husband in Providence we went to lunch together. I do not know where, but it was somewhere near the station. We were married on Sunday afternoon about 3.30. There were no witnesses present at the marriage. There were two witnesses to my former marriage, but I did not think it was necessary to have witnesses at a marriage, because I knew of people to be married right in Worcester without witnesses. I am not sure if Mr. Williams, the man that married us, was a justice of the peace, but as far as I know he was. He didn't say he was a justice of the peace. According to my husband's faith, he could not be married by a priest, and I could not be married by a rabbi, and when Jewish people are not married by a rabbi, they are always married by a justice of the peace. The day after I was married, I went back to Worcester, and lived with a Mrs. Gregory. I went up to Worcester one day in search of this woman, but I was not able to locate her. I have not made any search to find the man that married me, although the insurance company told me that if I could get a certificate from the man who married us saying that we were legally married, they would pay me the compensation. When the insurance company investigator asked me to find the justice of the peace who married me, I could not go. One time I told him that I did not have the means, and the other time I told him that I was in poor health, so could not take the journey to Providence. I did take a trip to New Jersey, however, but it was for my health, and I went to New York, but I did not travel alone. I have been to the cemetery in Worcester several times since my husband's death. After marrying Samuel Gron I worked and earned \$6 a week, which went towards buying my clothes. My husband paid my board and also bought some of my clothes. I did not know when I was married that I could not legally be married inside of six months from the time of my divorce. I did not know that I could not be married until the decree was made absolute. I saw the license my husband got for our marriage, and noticed that both his and my name were on it. My husband gave the license to Mr. Williams, and Mr. Williams kept the license and gave us a certificate.

I had the marriage certificate with some papers that I burned at the time I was putting my furniture in store. Mr. Williams's address was on the certificate, but I do not remember what it was. My husband gave up his work in Nashua and Providence because I did not want him to be away from me. Mrs. Gregory, the woman with whom we lived when we went back to Worcester after our marriage, knew that we had been married. She knew that we were engaged and were to be married.

Abraham Abramovitz testified: —

I have known Sam Gron ever since we were small boys, and I also know Mabel Phelan Gron. The general repute in the neighborhood was that they were man and wife. I first met Mr. and Mrs. Gron as man and wife in Worcester. I met them at the station at Worcester, and while we were walking up Grafton Street, Mrs. Gron said, "Did you tell Abe?" Her husband said, "No," so then Mrs. Gron told me that they had been married. At that time they were living in Worcester. I knew Mrs. Gron before the time she kept company with Sam Gron. I did not know that there was any question about their marriage.

Harris Michaelas testified: —

I have known Samuel Gron since boyhood. I am employed at Sherers, and when Sam asked me if there was anything that he could do there, I told him that I would speak for him when there was an opening. Sam got work at Sherers and worked there for a month or two, then he moved away. I have seen his wife in the store, and at one time Sam had a talk with me in regard to getting his wife a position in the store.

Lillian Wollaston testified: —

I have known Mabel Gron since she came to Boston. I made visits to her house and met Mr. Gron there. Sometimes in the evenings Mr. and Mrs. Gron would go to the moving-picture shows; sometimes they would go out walking, and other times they would stay in and read. Everybody looked on them as man and wife. I first met Mrs. Gron in a bakeshop, where she worked, and we have been very close friends ever since.

Maurice Lurier of Worcester testified: —

I have known Sam Gron as long as I can remember. I knew that Sam was married, and stopped with him a couple of days while he and his wife were keeping house on Savin Street. I met Mrs. Gron one time and she told me that she and Sam had got married. In Roxbury the repute was that they were man and wife. As far as I know, their acquaintance sprung up while they were both living at the Kenmore. Mrs. Gron was working there, and Mr. Gron was stopping there.

Thomas McGeary testified: —

I live in Boston and am an investigator for the Massachusetts Employees Insurance Association. I was to Providence this morning, and I have previously examined the records in connection with this case. The records in the Secretary of State's office show that since 1907 no man by the name of Williams has been appointed justice. I asked the Secretary of State for a negative certificate, that is, a certificate stating that Mr. and Mrs. Gron had not been married in Providence, but he refused to give it to me, as the Attorney-General requested him not to.

We find that at the time of the so-called marriage ceremony in Providence the claimant was then a married woman and had a husband living, and that the decree of divorce against her husband was not made absolute until Sept. 13, 1912.

We further find that the claimant entered into the ceremony of marriage with Samuel J. Gron at Providence in good faith, and believed that she was honestly marrying him by reason of the ceremony, but said alleged marriage was not performed with due legal ceremony; that no license to marry was issued; that no marriage certificate was ever issued, and that the person performing the marriage was neither a minister or elder of any religious denomination, nor a justice of the peace, and was not authorized to perform such ceremony; that from April 14, 1912, up to the time of his death, they lived together as husband and wife, and were known as man and wife in the localities in which they lived in Worcester and in Boston.

We further find that she was not the wife of Gron, and was not a member of the employee's family, and was not a dependent within the meaning of section 2, Part V., of the Workmen's Compensation Act, and is not entitled to compensation under such act.

JAMES B. CARROLL.

FREDERICK A. CARROLL.

JAMES F. MCAULIFFE.

CASE No. 850.

MOSES ASDOORIAN, *Employee*.

BOSTON ELEVATED RAILWAY COMPANY, *Employer*.

MASSACHUSETTS EMPLOYEES INSURANCE ASSOCIATION, *Insurer*.

CONTINUAL REFUSAL OF EMPLOYEE TO ATTEMPT TO PERFORM
WORK UNREASONABLE IN VIEW OF THE FACTS. BOARD
TERMINATES COMPENSATION PAYMENTS. CASE APPEALED
TO SUPREME JUDICIAL COURT.

The employee received a personal injury by reason of which the fourth and fifth toes of the left foot were amputated. Compensation was paid for a period of nearly eleven months, an offer of employment being made at various times during such period, said offers being refused. The impartial physician reported that he was able to perform the work offered by the insurer.

Held, that the refusal of the employee to accept such employment was unreasonable.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to Supreme Judicial Court.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Moses Asdoorian v. Massachusetts Employees Insurance Association, this being case No. 850 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Edward F. McSweeney of the Industrial Accident Board, chairman, Albert R. MacKusick of 6 Beacon Street, Boston, Mass., representing the employee, and William J. Holbrook, 55 Kilby Street, representing the insurer, heard the parties and their witnesses in the Board Room of the Industrial Accident Board, New Albion Building, Boston, Mass., Wednesday, May 13, 1914, at 10 A.M. Appearances: Vahan Kurkjian, for employee, John W. Cronin for insurer.

The facts in this case are as follows: —

Moses Asdoorian, twenty-nine years of age, residing at 409 Neponset Avenue, Dorchester, was employed as a car cleaner, at an average weekly wage of \$11.59, by the Boston

Elevated Railway Company, which company is insured with the Massachusetts Employees Insurance Association.

On Sept. 26, 1912, while the car on which Asdoorian was working was standing on a turntable, the shifter started the table away from him, and caught the left foot of Asdoorian, injuring him so that he had to be sent to the City Hospital. Here it was found that he had sustained a fracture of the fourth and fifth toes of the left foot, so that said toes were subsequently amputated. Asdoorian remained at the Boston City Hospital as a patient for six weeks, and was then transferred to the out-patient department, where, after six weeks' further treatment, he went to the hospital provided by the Massachusetts Employees Insurance Association, at 66 Westland Avenue, and finally went into the out-patient department of the Massachusetts General Hospital, where he was treated up to some time in August, 1913, and again from Feb. 28, 1914, up to March 27, 1914.

In March of 1913, about six months after the injury, Mr. Ralph C. Bush of the Boston Elevated, in charge of the Workmen's Compensation Bureau of that company, suggested to Asdoorian that he go back to work at his old job, but the injured employee said he could not do so because of his injury. The testimony shows that every month after March, 1913, until August of the same year, Asdoorian was requested by the Elevated Road representatives to return to his former work, but he continually replied that he would not because he was unable to perform the work.

On Aug. 12, 1913, at the request of the Industrial Accident Board, Asdoorian was examined by Dr. William H. Ruddick of South Boston, impartial physician appointed by the Board, and Dr. Ruddick reports as follows: —

Compound fracture of the fourth and fifth toes of the left foot, with laceration and crushing of the tissues connected therewith, seem to have been the injuries sustained by Moses Asdoorian Sept. 25, 1912. His toes were amputated at the Boston City Hospital, where he was kept a patient for six weeks, then transferred to the out-patient department, when, after another six weeks' treatment, he was induced to visit a hospital at No. 66 Westland Avenue, Boston, and finally drifted into the out-patient department of the Massachusetts General Hospital, and is still under the care of that institution.

Examination shows completely healed wounds of amputated toes and evidence, in the form of scars, that a septic condition in the tissues of the foot may have occurred soon after the accident.

Considerable pressure and manipulation of the foot caused no pain whatever. I could not find any tenderness. He has excellent joint motion. He is partially flat-footed, and has a slight limp in walking, but these conditions are improving by his wearing a foot-plate.

His earning capacity, in my opinion, has not been interfered with by the injury received. He is now able to and should be at work.

WILLIAM H. RUDDICK, M.D.

Asdoorian was paid by the Massachusetts Employees Insurance Association for the additional disability as required by section 11 of Part II. and for disability up to Aug. 16, 1913, when compensation was shut off by the insurer because of Dr. Ruddick's report. On or about Aug. 8, 1913, which was prior to the date of Dr. Ruddick's report and the date when compensation was stopped by the insurance company, Asdoorian was offered a job in Dorchester, by the Boston Elevated Railway Company, on a crossover. The work which he was expected to do was to act as a signalman where some repairs were being made which required that the cars be sent over a single track. For about two-thirds of the time Asdoorian would be able to remain seated, but during the rush hours, which consisted of about an hour in the morning, and the same at noon and night, he simply had to stand up and wave a flag. This offer to him was made in good faith and was refused, although, in Dr. Ruddick's opinion, as a result of his examination, Asdoorian was able to work.

Some time in December, 1913, Asdoorian reported at the Industrial Accident Board,—when it was found he was then learning the tailor's trade and was earning \$4 a week as an apprentice,—and requested that the company be asked to pay him the difference between his old rate of wages and the new; but the insurer refused on the ground that he had refused the work proffered him by them, and they did not believe it was their duty to pay for learning a new trade.

There is a record of the Massachusetts General Hospital that in February of 1914 Asdoorian reported there to change the plates which he wore to correct the injured arch of his foot. Asdoorian makes the claim that the reason he cannot work is

because he feels pain. The Armenian doctor, called in by him at the hearing, testified that Asdoorian undoubtedly feels pain, and that he should return to work only which requires no standing.

On the preponderance of the evidence the arbitrators find that as a result of the injury of Sept. 26, 1912, Asdoorian was disabled from labor until Aug. 16, 1913. He was entitled to and has received the twenty-five weeks' additional compensation, as provided in section 11, Part II.

The arbitrators further find that the payment by the Massachusetts Employees Insurance Association of disability compensation to Aug. 16, 1913, is full and sufficient compensation for the disability arising out of said injury of Sept. 26, 1912, and that Asdoorian is not entitled to any further compensation for this disability after that date.

This decision and all findings regarding compensation or the existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III. of the Workmen's Compensation Act, and the general provisions of said act and its amendments.

EDW. F. MCSWEENEY.
ALBERT R. MACKUSICK.
WILLIAM J. HOLBROOK.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, New Albion Building, Boston, Mass., on Thursday, Aug. 13, 1914, at 9.30 A.M., and affirms and adopts the findings and decision of the committee of arbitration.

The following new evidence was introduced: —

Dr. William H. Ruddick stated that he examined Moses Asdoorian on Aug. 12, 1913. The examination lasted about one-half hour. He could not detect any callous places on the foot. There was a thickening of the tissues at the line of the fracture of the metacarpal bone of the fourth toe of the left

foot. He does not believe that he showed any evidence of pain in walking. He did have a slight limp. If he had pain in walking it would affect his ability to work, standing all day, but by manipulation of the foot he did not apparently produce pain in this case. Pain is a subjective symptom, and he could find no tenderness in the foot. Asdoorian may not have been able to stand all day at work, but he was able to do some work. He could do the work of a motorman, but not that of a conductor. He could work sweeping barns of the railways, as he had a chance to rest. At the time of the examination he told him that he should have a specially constructed boot, as he is partially flat-footed, and it seemed to him that a great deal of the trouble was due to the condition of the foot and was not occasioned by the injury. He agrees with Dr. Lovett that a proper support would enable Asdoorian to do the work he did before the accident occurred. He found some calluses due to the healing, — a wound cannot heal without calluses. It is possible that the foot might not have been tender at the time of the examination, and might afterwards have become so, but he does not think that condition would still be the result of the injury, because the man's general appearance and his actions in the office and going down the street indicated that he was able to do work. Any man who has his toes amputated will always have more or less tenderness. It may not be continuous, but it would be recurrent — intermittent. He does not think this intermittent tenderness would interfere with his earning power. He still thinks he could work at a sweeping job requiring nine hours' work in eleven. If, while working, he struck his toes on any projecting substance, such as a box or stone, they would become tender.

The evidence presented to the committee of arbitration shows that the employee, Moses Asdoorian, received a personal injury arising out of and in the course of his employment on Sept. 26, 1912. While the car on which he was working was standing on a turntable the shifter started the table away from him, and Asdoorian's left foot was injured by reason of the fracture of the fourth and fifth toes. These parts were subsequently amputated.

In March, 1913, Asdoorian was offered employment at his former position, but declined this offer because of the incapacity due to the injury. Each month thereafter, until August of 1913, Asdoorian was requested by representatives of his employers to return to his former work, but he continually replied that he would not because of his inability to perform said work.

He was examined on Aug. 12, 1913, by Dr. William H. Rud-dick, the impartial physician appointed by the Industrial Accident Board, and that physician reported that his earning capacity had not been interfered with by the injury and that he was then able to work.

On or about Aug. 8, 1913, the employers offered Asdoorian light work, that is, work as signalman where repairs were being made, which required that the cars of the company be sent over a single track. For about two-thirds of the time Asdoorian would be allowed to sit down; but during the rush hours, that is, during an hour in the morning and another hour at noon and a third hour at night, the employee would be required to stand up and wave a flag. This offer was made in good faith and was refused by the employee.

The Industrial Accident Board finds, upon all the evidence, that all incapacity for work of the employee, Moses Asdoorian, as a result of the injury of Sept. 26, 1912, ceased on Aug. 16, 1913, in accordance with the findings of the committee of arbitration, and the insurer having paid compensation to that date, no further compensation is due the said employee under the Workmen's Compensation Act.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
JOSEPH A. PARKS.

CASE No. 872.

MARTHA KALANQUIN, WIDOW OF FRANCIS KALANQUIN (DECEASED), *Employee*.

CHESHIRE WHITE QUARTZ SAND COMPANY, *Employer*.

TRAVELERS INSURANCE COMPANY, *Insurer*.

FIBROID TUBERCULOSIS, OTHERWISE KNOWN AS "STONE GRINDER'S PHTHISIS," A PERSONAL INJURY.

The employee, a stone grinder, received a personal injury arising out of and in the course of his employment, by inhaling small particles of stone and dust, by reason of which the said employee contracted fibroid tuberculosis, usually spoken of as "stone grinder's phthisis."

Held, that this was a personal injury.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Martha Kalanquin, widow of Francis Kalanquin *v.* Travelers Insurance Company, this being case No. 872 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of James B. Carroll of the Industrial Accident Board, chairman, Thomas F. Cassidy of Adams, Mass., representing the widow, and William A. Burns of Pittsfield, Mass., representing the insurer, heard the parties and their witnesses at the Town Hall, Cheshire, Mass., on Saturday, May 16, 1914, at 11 A.M. Messrs. Walter J. Donovan and George H. Wright of Pittsfield, Mass., appeared for the widow, and Henry A. Moran of Springfield, Mass., appeared for the insurer and the Cheshire White Quartz Sand Company, as counsels.

It was agreed that Kalanquin worked for the Cheshire White Quartz Sand Company, that his widow is wholly dependent, and that his average weekly wage was \$12.

The arbitration committee viewed the premises and saw the mill in operation.

The widow contended that the employer was guilty of serious and willful misconduct. The insurer claimed that Kalanquin died from disease and not from injury.

The evidence is substantially as follows: —

Dr. Isaac S. F. Dodd of Pittsfield testified: —

I examined Francis Kalanquin on the 5th of December, 1913. He had a consolidation in the lung, difficulty in breathing, practically no temperature, a fast heart action, was thin and short of breath. He seemed to have difficulty with breathing, as well as rapid breathing. He had consolidation of the lung with very little destruction of lung. This is a form of tuberculosis. Something had irritated the lung and developed a consolidation rather than a destruction. He said he was working in the sand mill, and such a condition would correspond with the condition found in the lung. I was not his family physician. An appointment was made with me and he was brought to my office. I do not know that I have ever met a case exactly like this, but fibroid tuberculosis is only a form of tuberculosis, and is usually spoken of as "stone grinder's phthisis" or "grinder's consumption." While the primary cause is tuberculosis, the existing or aggravating cause would be smoke, dust or sand. I would say the difference between this consumption and the ordinary consumption is that there is relatively small amount of cough, not very much fever, and a consolidated condition of the lung rather than destruction of tissue. If he had something predisposing to this disease it would develop very rapidly in a few months. I only saw Mr. Kalanquin once, the 5th of December, 1913. I found just the upper part of the lungs filled up. A person who is perfectly sound might or might not contract this tuberculosis, but if he had anything the matter with his lung it would most likely develop. If a man had had pneumonia and went to work in a place like this, the condition in the lung would be aggravated and consumption would follow. With a perfectly well, healthy man, working in a place where he is breathing in this sand constantly, it would irritate the lung certainly, and if not develop the disease, predispose it to the development of it. I do not know whether or not you could get the lung ultimately filled up under these conditions.

Dr. Harry Nelson Archibald of Cheshire testified: —

I was Mr. Kalanquin's physician. He came into my office along the last part of October or the first of November of last year. He complained to me of rapid respiration, said his breathing was troubling him, could not get up hill, and that sort of thing. I looked him over, took his chest measurement, took his temperature, sounded his lungs, listened to his heart action, and did not tell him what I thought was the matter. I found he had a chest expansion of $\frac{1}{2}$ inch and it ought to be around 2 or $2\frac{1}{2}$ inches. I made a diagnosis of fibroid condition of the lung, the same condition described by Dr. Dodd. He had hard work to get air into his lungs. There was evolvment of both lungs, the right more than the left. After that I gave him very little treatment — there was practi-

cally nothing to do. I told him he would have to get out in the air. He had ceased to work then for a week or ten days. He died from consolidation of the lung. I treated him for bronchial pneumonia the spring before, but he made a very good recovery. Then I did not see him again until the fall. As far as I know, after the bronchial pneumonia he recovered his full strength and health.

Mrs. Martha Kalanquin, wife of the deceased employee, testified: —

I have one child, a boy. I lived near the sand mill about three years. My husband worked in the sand mill since 1911 up to the time he was taken sick, Nov. 6, 1913. When my husband first went to work there he was running the crusher, and then after that was kind of superintending the work. He did the general work around the mill. I have been in the mill quite often. There is lots of dust, so that you can hardly see anybody. The dust would kind of choke you and make you cough. There were about six or seven men working there, sometimes ten or twelve. For protection from breathing the dust they had muzzles. This was all that was done to protect them from the dust. It was dusty there all the time. My husband did not think there was any danger, but I always knew there was. My husband and I were talking quite awhile ago with Mr. Herbert Dean, and we told him that the sand was going to kill somebody if they did not protect the dust. He said he did not think it would hurt anybody. At the time my husband had pneumonia, I suppose he was pretty sick, but he was not sick very long. He had had no serious sickness until then. We were married in Cheshire twenty-eight years ago the 12th of February. I did not know my husband's relatives. His father, mother and sister are dead; his brother is living. My husband developed this cough on the 6th of November, 1913. This was the first time I knew him to cough.

James E. Sherman of Dalton testified: —

I was formerly employed by Mr. Dean as superintendent in the sand mill. I worked but a short time in this new mill. I worked in the other mill two or three years, but have worked for the Deans a number of years. In the old mill they prepared the sand by putting it into the crushers, then it went from the crushers to the chasers and was washed. This was done under water. I left because it was quite dusty and I did not care to work in the dust. It is not quite as dusty as Mrs. Kalanquin said. It is more like a dusty room. The reason for grinding under water was to wash the quartz and materials. The reason for the changing to the dry process is because you cannot grade it so well wet as dry. You can get all sizes together when dry. I do not know anything with reference to the mill at present. While I was there they were making alterations every little while.

George N. Hopkins testified:—

I have been in the sand business some little time. I was in the Dean plant last fall and again this morning, and it is practically the same now as then. In the fall there was quite a lot of dust arising from the crusher, and also from the separator; it seemed to be all through it to a considerable extent. I always considered it possible to prevent this dust from coming out, or at least to materially reduce it. I enclosed our machines that raised the dust. My reasons for doing this were to save the fine material, and also because I believed the dust would kill a man in from two to three years if he lived in it steadily. I wanted to enclose everything to make it as dust proof as possible. The Dean Mill's machine is entirely different from ours, but I don't see why a blower or apparatus cannot be raised there. They are grinding quarry sand. In our mill the quartz is ground under water. We have never operated our mill using the dry process. We sometimes dry the sand with radiators. It is sifted afterwards.

Herbert W. Dean, president and secretary of the Cheshire White Quartz Sand Company, testified:—

We changed our type of plant for several reasons. In the first place, there is more and more demand for the dry product instead of the wet product. I have heard since that it is dried with radiators, but did not know about this at that time. Another reason was on account of the grading; you cannot grade it accurately when wet. When it is wet the fine particles stick. Under some conditions the question of adopting a process to dry the sand would be prohibitive. It would be prohibitive to compete with anybody else and get out a small and accurately graded product if we had to dry it after washing and grinding it. I think it is an expensive matter to dry the sand after it has been ground under water. It would cost from 50 to 75 cents a ton to dry the sand. After drying it, it would have to be regraded. The fine grade is more valuable, but you get the output on the coarser grade. If you could save what you spend on quarrying and carting you might be able to dry it. We changed to the dry process to increase our output. The reason they started to wash the product was to sell to glass manufacturers, and that trade having practically died out, there was no business unless you could get a dry product. I think Kalanquin went to work on the crusher in November, 1911, and then was appointed mill foreman. He worked inside part of the time and outside the mill when he ran the engine. Last summer the mill was run by gasoline. The engine was in the other building by itself. Mr. Kalanquin ran that engine. He was doing this most of the time. We worked very little during the summer because we had no water. The first thing in the morning Kalanquin would oil up the machinery, see that it was in running order and make any repairs that were necessary, look

over the pipes to see that there were no leaks, and keep things going. We never have more than four men in the mill, and there are from four to six muzzles. The men are supposed to always wear them. When I am around they wear them, because I have so instructed them. If there is a leak in the pipes it will cause the dust to come down on the rolls, but it does not come into the air.

C. Filier testified: —

I knew Kalanquin fifty-three or fifty-four years. We came from the same place in France. Kalanquin has never been sick. I worked twelve years with his father, and his father has been dead thirty-eight years. His brother is still living. His sister died in childhood.

Amiel Ballott testified: —

Mr. Kalanquin and I were brought up together in France. I remember his father. Francis Kalanquin, the deceased, used to cough quite often. Before I came to this country his sister was living and used to cough quite often. I cannot say exactly what she died of, as I was living in this country eight years before she died. I was too young to know what his father died of.

We find that the work of grinding the material used in the mill is attended with a great deal of dust and dirt; that this is necessary in the process of dry grinding, and that it is necessary for the economical management of the plant to have the grinding done in a dry state. There was no evidence in the case that any of the officers of the company knew that the employment was attended with any undue hazard, and what precautions could reasonably be provided for, to protect the employees from the inhalation of dust, were provided by the employer. Taking into account all the evidence, we find that there was no serious and willful misconduct on the part of the employer. We further find that by inhaling the small particles of stone and dust the employee contracted fibroid tuberculosis, usually spoken of as "stone grinder's phthisis;" that because of this his lungs became consolidated, and as a result he died; that this was an injury which arose out of and in the course of his employment, which he received on Nov. 6, 1913, at which time he stopped working, and that his widow is entitled to compensation based upon one-half his average weekly wage of

\$12, or to the payment of \$6 per week for a period of three hundred weeks from the date of the injury, that is, Nov. 6, 1913.

JAMES B. CARROLL.
THOMAS F. CASSIDY.
WILLIAM A. BURNS.

CASE No. 875.

AARON LEE, *Employee.*

ALLES & FISHER, *Employer.*

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., *Insurer.*

OCCUPATIONAL NEUROSIS A PERSONAL INJURY UNDER THE ACT.

The employee received a personal injury by reason of his occupation as a cigar maker, said occupation causing a condition of neurosis in his hands and arms, with consequent inability to use them in the making of cigars. This condition was brought about by the unusual degree of strain upon certain groups of muscles for a long period of time, and because of the rapidity with which the said employee performed his work as a cigar maker.

Held, that this was a personal injury under the act.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Aaron Lee v. Employers' Liability Assurance Corporation, Ltd., this being case No. 875 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Dudley M. Holman, representing the Industrial Accident Board, chairman, Henry Abrahams, representing the employee, and John G. Brackett, representing the insurer, heard the parties and their witnesses in the Hearing Room of the Industrial Accident Board, New Albion Building, Boston, Mass., on Tuesday, May 5, 1914, at 10 A.M. John M. Morrison appeared as counsel for the insurer.

The question at issue is whether or not Aaron Lee received a personal injury arising out of his occupation, not due to any traumatic injury, but as a result of the gradual coming on of an occupational disease, this disease continuing until it reached a point when, on May 9, 1913, it was impossible for him longer to continue his work. The insurance company denied liability on the ground that there was no evidence of occupational disease, and that he was not entitled to compensation.

It was agreed that the average weekly wages were \$15.64. There was no claim for any traumatic injury, the claim being made that there is some occupational disease or injury.

It appeared in evidence that Aaron Lee was employed as a cigar maker for Alles & Fisher; that his work was rolling cigars; that while he was working he lost the feeling in his left hand; he could not continue making the cigars; at first he was troubled with only one hand, and about ten days afterwards both hands and arms troubled him. He stopped work about May 9, 1913, and went to Dr. Sturnick, Columbia Road, Dorchester, who sent him to the Massachusetts General Hospital. He then went to the Boston City Hospital and received electric treatment; he is still being treated there by Dr. Coriat twice a week; he feels much better now. There are times, for a period of about two weeks, when he feels very good, and then the old condition returns. He told Dr. Daly of the City Hospital of this; he feels a little better after his arm is massaged; he is fifty-three years of age and has been working in the cigar-making business since 1875; he has worked for Alles & Fisher since 1889; his weight has been between 112 and 115 pounds; he is married and has children; he was treated at the Boston City Hospital by Dr. Fairbanks; the only serious illness he remembers is when he had grippe; he was sickly as a child; he smokes about seven, eight or nine pipes of tobacco a day, and when he worked at the cigar factory he smoked the regular allowance of cigars a week. He drinks a whiskey glass of beer at night, and sometimes two glasses of beer. He would worry about little things that were not worth while; at the factory he works in the room where they roll the leaf tobacco and make the cigars; there are about 100 people working in that room. Since the latter part of February, 1914, he has

done some private, outside work, which would average about \$5.50 a week. He started to work about the second week in February.

Arthur Willard Fairbanks, M.D., physician and specialist in nervous diseases, stated that he examined Aaron Lee at the Boston City Hospital, and later at his office at the request of the insurance company. He examined him at his office on April 6, 1914. The past history, as far as it bears on the present condition, is practically negative. Lee stated that on May 17, 1913, while at work, his right hand suddenly felt queer, and became unable to roll cigars properly. He was obliged to give up work, and has not worked since. Soon after this the trouble went into the other hand, and eventually, to some extent, into the legs; he described the sensation as ticking like a watch; no neuralgic pains, numbness, paralysis or weakness; sometimes he thinks he cannot close his fingers — if he does, he has to open them again; he has occasional pain in his eyes; several months ago he had a backache, which was completely relieved by wearing a canvas belt. Examination fails to reveal any organic defect; there is no evidence of neuritis, no muscular atrophy in the small muscles of the hands; no tenderness along the nerve trunks; there is no record of a blood examination; blood pressure was taken twice — it was normal. Dr. Fairbanks' conclusion is that Lee is neurasthenic and hypochondriacal; his symptoms are not at all those of occupational neurosis. Dr. Fairbanks' opinion, based on his experience with others, is that Lee's work had nothing to do with his present complaint. Lee first came to the hospital in the early part of the year when Dr. Fairbanks was not on service; Dr. Fairbanks' term of service is from the 1st of August to the 1st of February. The diagnosis was made as occupational neurosis; when Lee first came to the hospital Dr. Knapp was the visiting physician and Dr. Coriat the second assistant; diagnoses are sometimes hurriedly made. Dr. Fairbanks has no doubt whatever that Lee has not occupational neurosis. If Mr. Lee has a predisposition to this nervous condition, the poor air in the room might increase it. Dr. Fairbanks has made no special study of occupational disease connected with the tobacco industry; the fact that Lee worked for so many years

in the tobacco trade would not exclude the possibility of the trouble being connected with the occupation; back of occupational neurosis is a diminished nervous resistance, and where the physician gains the confidence of the patient, he finds that there is some deep family trouble or some emotional disturbance; back of occupational neurosis is recognized a diminished stamina in the nervous system; when asked whether the general feeling that Lee has now is the result of a mental condition growing out of the original occupational trouble which he had, Dr. Fairbanks replied that that is a possibility, but personally, he would not consider that the probability; he would be inclined to say that his present symptoms have grown out of his nervous, hypochondriacal condition; he is in better condition now than he was at first.

Mr. Lee was sent to Dr. David L. Edsall to be examined by him as the impartial physician appointed by the Industrial Accident Board, and his report follows: —

I have examined Aaron Lee, fifty-three years old, of No. 10 Priesing Street, Jamaica Plain, a cigar maker whom you sent to me with the request to determine whether his condition of ill health was due to his occupation.

He states that about the 17th of May, 1913, having previously been well, his present trouble began with pain and weakness in the arm and shoulders, and with a sense of "flickering" in the arms and hands, and that within a very short time on that day this became so bad that he stopped work and has been unable to work since because of weakness in his arms and hands and inability to use them in his occupation as cigar maker.

This man presents no clear evidence of organic nervous trouble, but he has some apparent atrophy of the muscles of the hands and a distinct tremor of the fingers and hands which suggests that he may be developing chronic actual disease; but at present it would appear to be a functional condition, — a so-called "neurosis." Such states occur, not infrequently, in persons who in their occupation bring an unusual degree of strain upon certain groups of muscles for a long period of time, and particularly when they work very rapidly. I have seen a similar condition in cigar makers repeatedly, as well as in various other similar occupations, and it is generally known that such states occur. They are particularly likely to occur in persons who work in bad general hygienic conditions. I believe that the man's condition is a neurosis, but that it possibly has a definite basis in beginning organic nervous disease, and I think that it is due to his occupation.

DAVID L. EDSALL.

We find, therefore, that Aaron Lee is suffering from an occupational disease, which at the present time appears to be a functional condition, and that he is at the present time partially incapacitated.

We find that he was totally incapacitated from May 9, 1913, until Feb. 14, 1914, and that he is entitled to recover total compensation beginning with the fifteenth day after the accident, May 23, 1913, until Feb. 14, 1914, at the rate of \$7.82, and to partial compensation from Feb. 14, 1914, to the date of the hearing and continuing to some time indefinitely in the future; that he is earning \$5.50 a week, and that he is entitled to partial incapacity at the rate of \$5.07 a week from Feb. 14, 1914, to the date of the hearing, amounting in all to \$356.22.

This decision and all findings regarding compensation or the existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III. of the Workmen's Compensation Act, and the general provisions of said act and its amendments.

DUDLEY M. HOLMAN.

HENRY ABRAHAMS.

JOHN G. BRACKETT.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, New Albion Building, Boston, Mass., Monday, Aug. 3, 1914, at 3.30 p.m., and affirms and adopts the findings and decision of the committee of arbitration.

The evidence shows that the employee, Aaron Lee, received a personal injury arising out of and in the course of his employment, by reason of his occupation as a cigar maker in the employ of the subscriber, said occupation causing a condition of neurosis in his hands and arms, with consequent inability to use them in the making of cigars. This condition was brought about by the unusual degree of strain upon certain groups of muscles for a long period of time, and by reason of the rapidity

with which the said employee performed his work as a cigar maker. The employee was totally incapacitated for work, as a result of this occupational neurosis, from May 9, 1913, to Feb. 14, 1914, upon which latter date he became partially incapacitated, said partial incapacity now continuing. His average weekly wages at the time of the injury were \$15.64, and his average weekly wages on and after Feb. 14, 1914, were \$5.50.

The Board finds, upon all the evidence, that the said employee received a personal injury, by reason of his occupation as a cigar maker, arising out of and in the course of his employment, which totally incapacitated him for work from May 9, 1913, to February 14; that he is entitled to a weekly compensation of \$7.82 from May 23, 1913, to Feb. 14, 1914, a period of thirty-eight and one-seventh weeks, making a total of \$298.28; that he is entitled to partial compensation, based upon one-half the difference between \$15.64 and \$5.50, that is, \$5.07 weekly, from Feb. 14, 1914, to Aug. 3, 1914, a period of twenty-four and three-sevenths weeks, making a total of \$123.85; that there is due to date of this review the sum of \$422.13; and that the employee is entitled to the payment of compensation on account of partial incapacity for an indeterminate period, in accordance with the provisions of Part II., section 10, of the statute.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
JOSEPH A. PARKS.

CASE No. 877.

MARSHALL W. FRALIN, *Employee*.
WILLIAM LUXTON ESTATE, *Employer*.
UNITED STATES CASUALTY COMPANY, *Insurer*.

TUBERCULOSIS NOT MATERIALLY AGGRAVATED OR ACCELERATED
BY EXPOSURE IS NOT A PERSONAL INJURY UNDER THE
STATUTE.

The employee was afflicted with tuberculosis prior to the date upon which he claims he received a personal injury by reason of exposure in an unoccupied house in which he was employed as a painter. The temperature on that

date was 32 degrees above zero. The windows were open and some of the doors were down during the period of his employment there.

Held, that the condition of tuberculosis was not materially accelerated by reason of a personal injury arising out of and in the course of his employment.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Marshall W. Fralin v. United States Casualty Company, this being case No. 877 on the files of the Industrial Accident Board, reports as follows: —

The arbitration committee, consisting of James B. Carroll of the Industrial Accident Board, chairman, Herbert P. Sheldon, representing the employee, and John A. McCaig, representing the insurer, heard the parties and their witnesses in the Hearing Room of the Industrial Accident Board, New Albion Building, Boston, Mass., on Wednesday, May 27, 1914, at 10 A.M. A. R. Shrigley appeared as counsel for the employee, and A. R. Belyea for the insurer.

The employee claimed that while at work as a painter in an unoccupied building with the windows open he contracted, on the 11th of November, a bronchial trouble which lighted up an old tubercular trouble, and that he is at present incapacitated because of said tubercular trouble. He also claimed that this bronchial trouble was contracted in the course of his employment, and was caused by his employment, and that he is therefore entitled to compensation.

Marshall W. Fralin, 61 Regent Street, Roxbury, testified: —

I am thirty-one years old and have worked as a painter for the past ten years. I have worked for William Luxton off and on for the last eight years. The last time I went to work for him was on the 17th of June, 1913. On Nov. 10, 1913, I was working in a house at 14 Falmouth Street, Belmont. This was a two-family house which was being remodeled into a single house. This was a wooden house, and the windows and doors were all open, and there was no heat in the house whatever. The temperature on the 11th of November was 32, and it was very, very cold. I worked all day Monday, November 10, and all day Tuesday. We were removing the varnish and were going to paint after that was done.

I went to work on the 11th of November about 8 o'clock in the morning and finished that afternoon at half-past 4. That afternoon I took sick, but continued working until it was time to go home. In going home that night I rode inside the car with John J. Howland. When I got home I felt very sick, so didn't eat any supper. I took a hot lemonade and whiskey and went to bed. When I woke up in the morning my throat was sore and I was very hoarse. My chest was also sore and I was coughing a little. I continued to work, but kept growing worse all the time, and on November 24 I was examined at Burroughs Place, Boston, by a Dr. Barker. He said I had bronchitis, and told me to keep on working, which I did. The following Monday, when I went back to Burroughs Place, Dr. Barker told me that I had tuberculosis. I worked until Wednesday, December 3, and I could not work any longer because of shortness of breath and the pain in my chest. I went to see Dr. Floyd of Burroughs Place shortly after I stopped work, and he told me that I had better be sent away to the day camp at Mattapan. I went to Mattapan until the 24th of January, 1914, at which time I went to Lakeville Sanatorium, and I am there at the present time. I had never been treated for tuberculosis previous to the time I went to Burroughs Place, nor did I ever spit or cough prior to this time. I was earning \$20 a week while I was working for Mr. Luxton. I had not worked since Dec. 3, 1913. Dr. Kepler examined me this year, but I don't remember the date, and I told him at the time that I had had a cough for the three winters before that, but I was never treated for any cough which resulted from lung trouble. Upon examining the Weather Bureau I found that on the 11th of November, the temperature was 32. I am a great deal better now than I was. My cough is dryer and I raise very little now. I am still at the consumptives' home at Lakeville, and I do not know when I will be able to go back to work. That is something they won't tell you. The treatment I am getting is all open air. My weight now is 153. When I went away I weighed 130 pounds. Before I contracted the cold I weighed 139 pounds.

Dr. G. A. Webster, 419 Boylston Street, Boston, testified: —

I studied at Harvard; took various courses after I got through there. I was house doctor at the City Hospital for a year and a half after my college course, and am now an examining physician for the Metropolitan Life Insurance Company. My records show that Marshall Fralin was examined by me on Jan. 23, 1913. At this time I made a thorough examination of Mr. Fralin, as he was applying for insurance. I found no tuberculosis at that time. I found no lung trouble whatever.

Dr. Williston Barker, 4 Lyndhurst Street, Dorchester, Mass., testified: —

I graduated from the Harvard Medical School and have been practicing since 1908. At present I am what they call an assistant physician for out-patients at Burroughs Place. On Nov. 24, 1913, I examined Marshall Fralin. I made a complete physical examination above the waist, except the throat, and found that he was suffering from some extensive disease of the upper part of the right lung, and also from acute bronchitis. I found a dry patch on his lungs, which showed that he had had some trouble for some little time, or some time ago he had a bad cold in his chest. At the time I examined him I found that there was no active life disease in his lungs. It is possible that a person have a tubercular patch and that patch dry up, and the person not know that that process had ever started. It is possible that the cold contracted by Mr. Fralin on the 11th of November would be sufficient to have lit up the dry patches and started tuberculosis. If he had not contracted this cold it might have been possible for him to have gone through life without having tuberculosis in his system. In my opinion, I think that the tuberculosis from which he is suffering now was caused by the cold he contracted. I have no opinion as to the cause of the acute bronchitis. Tuberculosis might have started up itself at any time, but I think that the cold which he contracted aggravated it. The bronchitis which this man had is not anything that is peculiar to any employment, but is simply the acute bronchitis that you see in all ages.

Mrs. Ada F. Fralin, wife of Marshall W. Fralin, testified: —

I remember my husband coming home sick some time in November of last year. He would not eat any supper. He lay down on the lounge, and I gave him some hot lemonade and whiskey to drink. When he got up in the morning his throat was sore, but he went off to work just the same. I do not recall the day of the week it was on which he came home sick, but I think it was about the 12th of November. He was always well and strong previous to that time, but from that time on he grew worse each day. He seemed to be coughing more and his throat seemed to be getting worse and he was not eating well. This condition continued for about two weeks, and then he thought he had better go and see about himself. He went down to Burroughs Place and was examined. He went to Mattapan, and on the 24th of January he went to the consumptives' home in Lakeville. I never saw him spit around the house before he contracted this cold, and I never knew him to be treated for lung trouble.

John J. Howland testified: —

I have known Marshall Fralin for the past two years. We were working together on November 10 and 11 in the house at Belmont, taking off varnish. All the doors on the first floor of the house were open, and the windows throughout the whole house were up. It was very cold working

here, so I spoke to the carpenters about the windows being up. I asked if the windows could not be closed, and they said, "No." In the afternoon of Tuesday, November 11, Mr. Fralin complained about a cold which was coming on. Both he and I rode home together in the car. The next day he came to work, but he was hoarse and complained of a cold in his chest. I have worked with Mr. Fralin before, and up to November 11, when he contracted the cold, he had always been well and strong, as far as I could see. I never saw him spit around. On the 11th of November it was too cold to allow us to apply the paint. Around that time it was cold for three days, and then it got a little warmer. There were three carpenters working on the house, putting up door frames, etc. The carpenters said they felt cold, but it could not be helped. The door on the second floor where we were working was off the hinges, and the door on the lower floor was swung open.

Frank F. Crilley of South Boston testified: —

I have known Marshall Fralin for the last four years, and we have worked together as painters for the last two years. All through the summer of 1913 I worked with Mr. Fralin, and he was at that time about the strongest man in the shop. He was able to do hard work and never seemed to tire. All the time I knew him I never saw him coughing or spitting around.

Mr. Fralin was sent to an impartial physician, viz., Dr. Ruddick, whose report is as follows: —

Marshall W. Fralin, thirty-one years, married, painter, lives at 61 Regent Street, Roxbury, Mass. While this man was working at 14 Falmouth Street, Belmont, Mass., Nov. 11, 1913, he developed chills and diffused bodily pains; next day had sore throat, husky voice, cough and expectoration of yellow matter. These symptoms continued until Nov. 24, 1913, when he was examined at No. 13 Burroughs Place, Boston, by Dr. Barker, who said he had bronchitis and a tubercular scar in upper part right lung. Another physician present at the time said he had a suspicious looking throat. At their request he reported again, Dec. 1, 1913, and their diagnosis was tuberculosis, although he was working all the time. Dec. 3, 1913, he was obliged to give up work on account of general weakness, pain in chest and shortness of breath. Shortly after this he was admitted to the day camp at the Tuberculosis Hospital, Mattapan. He remained there until Jan. 23, 1914, and was transferred the following day to the Lakeville Sanatorium, where he now is.

In addition to the above, this man gives a history of two years' treatment for syphilis at the throat department of the Boston City Hospital from Jan. 11, 1911.

Physical examination shows on percussion a sharply defined region of

dullness over the anterior and lateral portions of the chest, especially middle lobe of right lung. Auscultation reveals bronchial breathing, and diminished respiratory sounds in this region. It seems to me this man may be suffering from syphilis of the lungs, as many of his symptoms and past history indicate. I consider his case a favorable one, as he has gained 18 pounds in weight since last January. If this improvement continues he will in time recover and be able to go to work again.

WILLIAM H. RUDDICK, M.D.

We find that he was afflicted with tuberculosis prior to the 11th of November, 1913; that prior to this date tuberculosis was in a latent state; that on that date he was working as a painter in an unoccupied house in Belmont, and the windows were open and some of the doors down, and the temperature on that date was 32 degrees.

We are not satisfied that the bronchial trouble was contracted on the 11th of November, nor that it was contracted because of any employment in which he was engaged.

We therefore find that his injury did not arise out of and in the course of his employment, and he is not entitled to compensation under the act.

JAMES B. CARROLL.

JOHN A. McCAIG.

Herbert P. Sheldon dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room of the Industrial Accident Board, New Albion Building, Boston, Mass., on Thursday, July 2, 1914, at 10.15 A.M., and affirms and adopts the findings and decision of the committee of arbitration.

The evidence shows that the employee, Marshall W. Fralin, was afflicted with tuberculosis prior to Nov. 11, 1913, the date upon which he claims he received a personal injury arising out of and in the course of his employment, by reason of exposure in an unoccupied house in Belmont, in which he was employed as a painter. The temperature on that date was 32 degrees

above zero. The windows were open, and some of the doors were down during the period of his employment there. The employee continued to work until Nov. 24, 1913, when his attending physician diagnosed his trouble as bronchitis. Later, on Dec. 1, 1913, the diagnosis was tuberculosis. The employee has been incapacitated for work from Nov. 24, 1913, to the date of the hearing on May 27, 1914, said incapacity continuing.

The Board finds that the condition of tuberculosis from which the employee was suffering on Nov. 11, 1913, was not materially aggravated or accelerated by his exposure during his employment in the unoccupied house in Belmont, nor was the said employee exposed by reason of said employment to more than the ordinary risk of cold to which any person working in the open was exposed on that day. The temperature in which the employee was obliged to perform his work was not especially low, and the employee was not peculiarly exposed, by reason of the conditions under which he was required to perform said work, to the dangers of bronchitis or other pulmonary diseases; and we find that his employment caused neither the bronchitis nor the tuberculosis.

The Board further finds that the employee was not incapacitated for work by reason of a personal injury arising out of and in the course of his employment.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
EDW. F. MCSWEENEY.

CASE No. 884.

EMMA L. BRIGHTMAN, WIDOW OF IRA B. BRIGHTMAN (DECEASED), *Employee*.

J. C. TERRY, *Employer*.

ÆTNA LIFE INSURANCE COMPANY, *Insurer*.

VALVULAR HEART TROUBLE ACCELERATED AND AGGRAVATED
BY PERSONAL INJURY ARISING OUT OF AND IN THE COURSE
OF THE EMPLOYMENT. SUPREME JUDICIAL COURT AFFIRMS
DECISION OF BOARD.

The employee, a cook, was required by his contract of employment to live on board the lighter. When it became known that said lighter was sinking, the said employee made several trips to and from the deck of the boat in an attempt to save his clothes and a surveying instrument that belonged either to the engineer or his employer, the evidence on this point leaving the ownership in doubt. The employee had suffered from valvular heart trouble prior to the day of the injury, and his exertions in saving his belongings and the surveying instrument, together with the excitement incidental to the sinking of the vessel, so accelerated and aggravated said heart weakness that the employee died on the dock at a point near where the vessel sank.

Held, that this was a personal injury arising out of and in the course of the employment.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to Supreme Judicial Court.

Decision. — The Supreme Judicial Court affirms the findings of the Industrial Accident Board.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Emma L. Brightman, widow of Ira B. Brightman, *v.* Ætna Life Insurance Company, this being case No. 884 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Dudley M. Holman, representing the Industrial Accident Board, chairman, Harold E. Clarkin, representing the widow, and William C. Gray, representing the insurer, heard the parties and their witnesses in Committee Room No. 35, City Hall, Fall River, Mass., on Tuesday, May 26, 1914, at 2 P.M. Messrs. John T. Swift and C. W. Donovan appeared for the insurer and Messrs. Slade & Borden for the widow.

Agreed that Mr. Brightman worked for J. C. Terry and that he was a cook on this lighter and that the barge sank.

Charles W. Milliken, M.D., a physician and surgeon practicing in Barnstable, and also medical examiner for Barnstable County, testified as follows: —

When I made out the death certificate I wrote "heart disease, no violence," and by "no violence" I meant there were no signs of violence on the body, and from questioning those who were present at the time there was no evidence of suspicion given, no suspicion of foul play; the call regarding this death came to my house somewhere about noon, and I got to the location of the death about 4 P.M. As a result of my examination, I came to the conclusion that he probably died of heart disease, and I say "probably" because no one can be sure without an autopsy; there was no autopsy in this case; there being no suspicion of violence, no autopsy was held; in order to hold an autopsy one has to secure permission from the district attorney. I got the history of the case from the fellows that were with him, then I opened up his clothes and examined the body superficially. Mr. Peterson, the principal, made the statement that the man was generally short of breath, and that was all I learned of his physical condition. He was a stout built man, I should judge about 5 feet 6 or 8, and weighed over 200, probably 210 or 215. I tried to ascertain facts regarding any previous illnesses, but could get no definite information.

Q. Assuming, doctor, that this man, the deceased, was a cook on this lighter, and that he was employed in the galley which is below the dock; that while in the course of his employment on the boat he sees water begin to come into that, and that thereafter he goes from the galley to the dock or wharf, perhaps, with his clothes and other belongings, three times, and that afterwards he leaves the boat or lighter and goes to the dock, — wharf, — and he places himself in a position between the rocks, surrounded by rocks so that he could not get out, and that thereafter he stands over ten minutes or thereabouts and then somebody screams that the boiler is about to blow up and then the man drops dead, what, if anything, in that hypothetical question would you say was responsible for his death; what, if anything, in connection with that question would you say was responsible for the man's death; what would you say, if anything? A. I think it is probable that the man had a heart disease, and that the excitement and his exertion of hurrying back and forth from the galley to the dock with his belongings, and the excitement of some one calling out, might have indirectly been the cause of the sudden collapse of his heart; but there is no question in my mind but what the heart in that condition would be affected that way, — that it was a matter of but a few years when the heart lesion itself would have carried him off.

From general observation of such cases as I judged his case to be,

death is a matter of from two to five years. His face turned dark, and that doesn't always happen; sometimes they turn pale; it depends on the nature of the case; in cases of valvular heart trouble the skin turns dark; I judged he had valvular trouble of the heart. It might have been possible for him to live five years, but I doubt it; I judged that his prospect of life was less than five years from the fact that I judged somewhat by the build of the man, feeling of the radial artery, which was hardened, showing that he had a hardening of the arteries, puffing up under the eyes, — and those things all go with cases which usually limit life to about five years; without exertion and without excitement he might have a fair prospect of living five years; it is possible. I don't know, of course how long he had that condition, but five years is usually the limit. What I have said about his prospect of life is just a matter of opinion. In all cases where there is a heart lesion excitement is a bad thing. I think the exertion and the excitement was the indirect cause of the man's death; if this lighter had not sprung aleak he probably would not have died then. I did not hear anything about the boiler going to explode until I came in here.

Fred C. Wales, manager for J. C. Terry, testified as follows: —

When I arrived at the scene of the accident I gave certain orders as to what should be done in regard to raising the boat, and had my assistant, Mr. Perkins, go to the telephone and notify the office about the occurrence and about Mr. Brightman's death. The men were all excited; nobody seemed to know just what they were doing; some of them showed it in their faces very strongly. Mr. McIsaac looked as though he had gone through quite an ordeal. I found Mr. Cronin, who was also engaged in that work, in a similar condition to that in which I found Mr. McIsaac; in other words, the men were all worked up in consequence of this accident. Mr. Brightman received \$11 a week and lodging; we figure board at 55 cents a day for a man, seven days in the week in the case of cooks, and the matter of lodging is somewhat hard to state, but the value I should say would be about \$1.50 a week, so that the total amount of his wages would be slightly in excess of \$16. He worked for us steady; he had been in Mr. Terry's employ for six years, and I have known him personally for longer than that. We paid \$11 in cash, and of course we paid all the grocery bills and fuel, light, and furnished a place to sleep. After the lighter sank I got a place for the men to board and lodge, and that cost \$1 per day per man; that included lodging. In his capacity as cook, Mr. Brightman was obliged to be on the boat about all the time. He had to be on the ship practically all the time during the daytime. He had to be there in the morning to get the breakfast. He was hired with the understanding that he would live on the lighter. The agreement with Mr. Brightman was this: he was to have \$11^⁹ a week in cash, and

he was supposed to feed the men, — give them everything necessary and proper at as low a cost as he could; we figured that would cost us 55 cents a day, but it cost us more; we figured that \$16.50 all went to him.

John McIsaac testified as follows: —

I was a diver on the lighter and was there at the time of the accident. The diving outfit belonged to me and I saved it. Mr. Brightman was tending to his clothes and an instrument, and I don't know whether that instrument belonged to the engineers or to the Terry concern. He got those things out and one of Mr. Wales' men was helping him. There were stones on the dock and Mr. Brightman was standing between the stones; his face was all covered with soot. I saw Mr. Brightman go up and down stairs two or three times. Everybody ran away, and I heard Mr. Brightman breathing awfully heavy, and the next thing I hollered to one of the fellows that there was something the matter with him; he simply settled right down; he did not fall right down; we just had time to get the diving outfit on the dock.

We find, therefore, on all the testimony in the case, that Ira B. Brightman, the deceased employee, had valvular heart trouble previous to the date of the injury; that this condition of his heart was so aggravated and accelerated by the excitement and exertion occasioned by the sinking of the lighter that he died as a result thereof; and that his widow, Emma L. Brightman, is entitled to receive one-half his average weekly wage of \$16.35, or \$8.18, for a period of three hundred weeks from the date of the injury, making a total of \$2,454.

DUDLEY M. HOLMAN.

HAROLD E. CLARKIN.

WILLIAM C. GRAY.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room of the Board, New Albion Building, Boston, Mass., on Thursday, June 25, 1914, at 2.45 P.M., and affirms and adopts the findings and decision of the committee of arbitration.

The evidence shows that the employee, Ira B. Brightman, was a cook in the employ of the subscriber, J. C. Terry, and

that his average weekly wages were \$16.35. His contract of employment required him to live on board the lighter, and he had to be on board ship practically all the time during the day. When it became known that the boat was sinking, the employee, Brightman, made several trips to and from the deck of the boat in an attempt to save his clothes and a surveying instrument that belonged either to the engineer or his employer, the evidence on this point leaving the matter in doubt. The employee then hastened with his clothes and the instrument referred to to the dock. He had suffered from valvular heart trouble prior to the day of the injury, and his exertions in saving his belongings and the surveying instrument, together with the excitement incidental to the sinking of the vessel, so accelerated and aggravated said heart weakness that the employee died on the dock, at a point very near where the vessel sank. (Clover, Clayton & Co. v. Hughes (1910), 3 B. W. C. C. 275.)

The insurer raised the point that the employee had not acted reasonably in subjecting himself to the danger of death by heart failure in saving his belongings. It was not unreasonable for the employee to journey to and from the sinking vessel in an endeavor to save his personal effects. (Cokolon v. Ship "Kentra" (Owners of), 1912, 5 B. W. C. C. 658.)

The Board finds, upon all the evidence, that the employee, Ira B. Brightman, received a personal injury arising out of and in the course of his employment, said injury materially contributing to his death by reason of its accelerating and aggravating effect upon an already diseased heart; and that his widow, Emma L. Brightman, who lived with him at the time of his death, is entitled to a weekly payment of \$8.18 for a period of three hundred weeks from the date of the injury.

The insurer has filed requests for rulings which are attached hereto, No. 1 being given and the others refused.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
EDW. F. MCSWEENEY.

Rulings requested by Defendant.

1. The burden of proving that the injury arose out of the employment of the deceased is upon the petitioner.

2. Upon the facts, the death of the deceased was not caused or brought on by the work in which he was engaged.

3. Upon the facts, the said Brightman's death was caused by his overexertion in saving his own personal effects, and did not arise out of and in the course of his employment.

4. Upon the facts, the deceased voluntarily abandoned a place of safety in order to save his effects, and not while he was engaged in his occupation.

5. The dependent or petitioner has not satisfied the burden of proving that the injury arose out of the employment of the deceased, and is not entitled to compensation.

JOHN T. SWIFT.

Decree of Supreme Judicial Court on Appeal.

RUGG, C.J. It is contended by the dependent that the question whether the findings are supported by the evidence is not open. By section 7 of Part III. of the Workmen's Compensation Act (St. 1911, c. 751, as amended by St. 1912, c. 571, sect. 12) the committee of arbitration is required to file with the Industrial Accident Board its decision, "together with a statement of the evidence submitted before it, its findings of fact, rulings of law, and any other matters pertinent to questions arising before it." No party is entitled to a second hearing as matter of right before the Industrial Accident Board upon any question of fact. (Sect. 10 of Part III.) It seems from the record, and the course of the argument in this court, that no evidence was received by the Industrial Accident Board, but that its hearing was confined in this respect to the matters reported by the committee of arbitration. The finding and decision of the Industrial Accident Board is not explicit in this respect. It would be desirable to have the fact stated definitely in order that occasion for doubt may be removed in future cases. But we feel warranted in making that assumption in

the case at bar for the reasons stated. In any event, it is an assumption in favor of the appealing party. It must be assumed that the committee of arbitration performed its duty and reported all the material evidence. The procedure in this respect differs from that on exceptions from the Superior Court, where, if the sufficiency of the evidence to support the verdict or finding is raised, it must appear that the material evidence is set forth (*Burbank v. Farnham, ante*), and also from that on findings and decision of the Industrial Accident Board (*Stickley's Case, ante*). The positive duty resting on the committee of arbitration to report all material evidence supplies the absence of the express statement required in a bill of exceptions. It follows that it is open to the insurer to argue that the findings are not supported by the evidence reported.

The deceased employee was a cook upon a lighter, where his employment required him to live and be a large part of the time. The craft began to sink, and he then made several trips to and from the deck in an attempt to save some of his clothes and a surveying instrument. With these he hastened to the dock, where he died soon after. He had suffered from valvular disease of the heart, and his exertions in the effort to save his belongings, and the excitement incident to the loss of the vessel, so aggravated the heart weakness as to cause his death. The perils of the sea were risks arising out of and in the course of the employment of the deceased. The sinking of the boat obviously was one of these perils. It is impossible to say, as matter of law, that it is not one of the instincts of our common humanity to try to save from a sinking vessel all of one's possessions that reasonably can be secured. The deceased perhaps exerted himself too much for this purpose, although it would be difficult on the evidence to determine to how great an extent the fatal result was due to that cause rather than to the excitement of the occasion. Under these circumstances the calm and wisdom of quiet and safety cannot be expected. Much must be excused to the surrounding commotion. The deceased did not abandon the service of his employer and embark on a venture of his own when he tried to save his clothing. It was an implied term of such service as this that the employee might use reasonable effort to this end in an exigency like that which

arose. This is not an instance where the discipline of a ship was violated or a higher duty neglected. It was in the course of his employment to live upon the lighter. Whatever it was reasonable for any one to do leaving a sinking vessel, which was his temporary home, was within the scope of his employment. The standard to be applied is not that which now, in the light of all that has happened, is seen to have been directly within the line of labor helpful to the master, but that which the ordinary man required to act in such an emergency might do while actuated with a purpose to do his duty. The cases relied upon by the insurer, collected in 25 H. L. R. 420, 421, are distinguishable. They all are instances of conduct by the employee, quite outside the scope of the employment, resting upon intelligent abandonment for the moment of duty to the employer. In the case at bar there may be found to be apparent to the rational mind a causal connection between the employment and the thing done by the employee at time of the sinking of the lighter. (McNichol's Case, 215 Mass. 497.)

Acceleration of previously existing heart disease to a mortal end sooner than otherwise it would have come is an injury within the meaning of the Workmen's Compensation Act. (Wienert v. Boston Elevated Railway, 216 Mass. 598; Clover, Clayton & Co., Ltd., v. Hughes (1910), A. C. 242.) The inference that the death of the employee arose out of and in the course of his employment was warranted by the evidence.

Decree affirmed.

CASE No. 890.

NELSON JAMIESON, *Employee.*

WILLIAM BARRETT, *Employer.*

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *Insurer.*

PERSONAL INJURY IS SUCH AS TO REDUCE EMPLOYEE TO NON-DESCRIPT OR ODD-LOT LABOR CLASS. COMPENSATION AWARDED ON BASIS OF EARNING CAPACITY.

The employee received a personal injury which caused a fracture of the bones in his left hand and of his right arm, above the elbow, the latter being so serious that the broken bone has never united. The left hand is considerably stiff and cramped, and the right arm is incapable of use. The employee endeavored to obtain work at various places of employment without success, and was in fact unable to earn any wages.

Held, that the employee was totally incapacitated for work by reason of the injury.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Nelson Jamieson v. Fidelity and Deposit Company of Maryland, this being case No. 890 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of David T. Dickinson of the Industrial Accident Board, chairman, Matthias J. Nesdale of Boston, representing the employee, and W. Lloyd Allen of Boston, representing the insurer, heard the parties and their witnesses in the Hearing Room of the Industrial Accident Board, New Albion Building, Boston, Mass., on Tuesday, May 19, 1914, at 10 A.M. Albin L. Richards appeared for the insurer.

The committee finds that this employee, a man fifty-four years of age, on Dec. 23, 1912, received an injury arising out of and in the course of his employment. While working as a teamster he was thrown from his seat and the wheels passed over him, causing a compound fracture of the bones of his right arm above the elbow, and also breaking some of the bones in his left hand. The compound fracture in the right arm has necessitated four operations, one of them consisting in transplanting a strip of bone from the right leg to said injured arm. The broken bone in the right arm has never united since the injury. The left hand is still considerably stiff and cramped and partially incapacitated. The right arm is incapable of use. The left arm itself is normal.

His average weekly wages at the time of the injury were \$13.50. By reason of his injury and resulting condition he has been reduced in working capacity to a few possible positions, such as a watchman, and with even a limited ability for this. He had been formerly employed as a teamster for the Boston Elevated Railway Company, but has been unable to secure any position with this company as a watchman or in any other light work since the injury by reason of his limited capacity. He had also applied for work as a watchman unsuccessfully with the Nawn Contracting Company, and his friends had made

efforts for him. He has been paid compensation for total incapacity at the rate of \$6.75 per week until April 6, 1914, when it was stopped by the insurer.

The committee finds that what partial incapacity for work this employee now has is only that of a nondescript or "odd-lot" labor class, as mentioned in the case of *Cardiff Corporation v. Hall*, 4 B. W. C. C. 159, and that the burden is upon the insurer of showing that the employee is able to obtain any earnings from such odd-lot employments. He has not been able to obtain any employment or earn anything since the injury and by reason thereof, and such inability is still continuing.

The committee therefore finds that he is entitled to his weekly compensation at the rate of \$6.75 per week from April 6, 1914, and that said compensation shall continue during said incapacity.

This decision and all findings regarding compensation or the existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III. of the Workmen's Compensation Act, and the general provisions of said act and its amendments.

DAVID T. DICKINSON.
MATTHIAS J. NESDALE.
W. LLOYD ALLEN.

CASE No. 893.

HENRY HOMAN, *Employee.*

NEW ENGLAND OFFICE FURNITURE COMPANY, *Employer.*

FRANKFORT GENERAL INSURANCE COMPANY, *Insurer.*

COMBINATION OF STRAIN AND UNUSUAL POSITION A CAUSATIVE FACTOR IN RUPTURE OF CEREBRAL ARTERY. EMPLOYEE INCAPACITATED FOR WORK THEREBY. ARBITRATION COMMITTEE FINDS AGAINST EMPLOYEE. BOARD ON REHEARING DE NOVO AWARDS COMPENSATION ON ACCOUNT OF INCAPACITY FOR WORK. CASE APPEALED TO SUPREME JUDICIAL COURT.

The committee of arbitration found, on all the evidence, that the employee was not incapacitated for work by reason of a personal injury, as claimed.

The evidence before the Industrial Accident Board showed that the employee received a personal injury arising out of and in the course of his employment by reason of a strain, which materially accelerated a condition of arterial sclerosis and totally incapacitated him for the performance of work. The strain of forcing screws into a mahogany desk, combined with the unusual position underneath the desk in which the employee was obliged to work, was the immediate and causative factor which brought about the rupture of the cerebral artery.

Held, by the committee of arbitration, that the employee was not entitled to compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board finds and decides that the employee was totally incapacitated for work by reason of a personal injury by strain.

Appealed to Supreme Judicial Court.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Henry Homan v. Frankfort General Insurance Company, this being case No. 893 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Joseph A. Parks, chairman, representing the Industrial Accident Board, Horace G. Pender, representing the insurer, and Edward M. Shanley, representing the employee, heard the parties and their witnesses in the Hearing Room, New Albion Building, Boston, Mass., Tuesday, May 26, 1914, at 10 A.M., and Wednesday, Sept. 9,

1914, at 3.30 P.M. H. R. Bygrave, Esq., represented the insurer and John A. McVey, Esq., represented the employee.

The question at issue in this case is whether or not the employee, Henry Homan, a man of the age of sixty, is entitled to compensation on account of incapacity for work following a cerebral hemorrhage, preceding a fall, during the performance of certain work for his employer. The average weekly wages of the employee were \$14.

Edward J. Connolly testified that he was working in the basement where Henry Homan was working on Jan. 25, 1914. He happened to look in the room where Homan was and saw him lying on the floor on his hand. He laughed and asked what the matter was, Homan saying it was no laughing matter. Homan said he fell and hit his head against the vise and fell to the floor. Connolly picked him up and took him over to the tool chest. He felt of his head and noted a little bump at the base of the brain. He got some hot water and applied it to Homan's head for about one-half an hour. He asked Homan if he could raise his hand and he said, "No." An automobile was called and Homan was taken away. The doctor said that an artery must have burst in the brain. He did not know who the doctor was. Homan was a cabinet maker, and had been screwing a top on a flat-top desk, with his body underneath the desk, when on getting up from this position he felt dizzy and fell backwards, hitting his head. Homan had done this work for years, and the position he was in was no more trying then than it had been many times before. Homan had not worked since the accident.

Mary Stringer, Dorchester, Mass., testified that on the 27th of January Henry Homan came to her house in a taxicab. She sent for the doctor, who said that he had broken a blood vessel in the head. Prior to this time his health had been good. He did not tell the doctor about the accident, although he was conscious.

A record from the Boston City Hospital, taken a day after the accident, was introduced. The record showed that Henry Homan was a man sixty years of age, a cabinet maker. Diagnosis: cerebral hemorrhage. Past history showed that patient had never been sick except when a child with scarlet fever, and

pneumonia a few years ago. Present illness: last Tuesday, while patient was at his work, suddenly became dizzy and fell, striking his head on his bench. Patient was not unconscious, and was taken to his home in an auto. Noticed he could not move left arm or leg and cannot now. Now shows paralysis of the left arm and left leg. A slight left facial paralysis, tongue protrudes to left of median line. Heart: area within rectus sounds regular and distinct. No murmurs. Pulses equal and of good volume and tension. Moderate tortuosity of vessels. February 2, 6, 10, 14, 18, 22, 26 and March 4 and 8 the patient was gradually growing stronger, and on the 8th could stand and extend leg with fair strength. Discharged March 14, much relieved but still weak on left and unable to walk.

Hormadis LeClair, M.D., testified that he saw Mr. Homan nearly every day while at the hospital, and that he did not see any bruises on the injured man's head, nor was there any fracture of the skull. There was not sufficient evidence on the outside of the head capable of having caused cerebral hemorrhage. He had marked arteriosclerosis, and in the opinion of the doctor it would take more of a blow than he had to cause such a thing. He did not give history of having a blow, but gave the characteristic story of having a dizzy spell and then falling on something. This is the characteristic story, — to have the hemorrhage and then fall. His condition was primarily due to cerebral hemorrhage. In the first place, the man has kidney disease, with a high blood pressure and tortuosity of vessels. The employee also has Bright's disease. This is all characteristic of cerebral hemorrhage and produces predisposition to cerebral hemorrhage.

Timothy Leary, M.D., who was requested by the committee to make an impartial examination, reported as follows: —

I made a visit on August 3 on Henry Homan as you requested. The history which he gives indicates a freedom from a serious disease since the age of two. He is now sixty-one years of age, and was employed as a cabinet maker at the New England Office Furniture Company for fifteen or sixteen years. His work consisted in repairing old furniture; there was no new work.

On January or February 28 (he cannot remember which) he was sent upstairs in the shop to put on a top of a double flat-top desk, measuring

5½ feet each way. He was sitting underneath, looking up, driving screws into the top, when he grew dizzy, and when he got up he staggered and fell, striking head on edge of his bench. His fall attracted the attention of his fellow workman (there being only two men employed by the New England Office Furniture Company), and his fellow workman picked him up and laid him on his (Homan's) chest. He did not become unconscious, but had no feeling on the left side. He developed some swelling on the back of his head, although there was no cut. His boss sent him home in an automobile. Dr. John Wallace of 219 Warren Street was called, who sent him to the Boston City Hospital, where he stayed five or six weeks, being transferred to the McCreight Home, 58 Bowdoin Avenue, where I visited him. He is a well-nourished man, of cheerful aspect, appearing to be about sixty years of age. His face shows some smoothness on the left. He talks through the right side of mouth, protrudes tongue toward right. He has considerable motion in left arm and a fair grasp for large objects. He cannot grasp small objects, therefore cannot use a crutch. Left leg shows good voluntary motion forward and laterally, though it develops marked tremor, which, he complains, interferes with his walking. He can cross his legs, but his left leg is not under good control, because of tremor, unless crossed over the right. He has normal heart sounds, the aortic second being somewhat accentuated. His pulse is strong, compressible with some difficulty, and pulse on right is measurably stronger than that on left.

Opinion.

This man is suffering from a cerebral hemorrhage which came on spontaneously as the result of a rupture of a vessel within the brain, independent of traumatism. His fall was, in my judgment, a sequence, and not a cause of the hemorrhage.

The position in which he was working beneath the bench, and the cramped and unusual position of the head, I believe to have been responsible for the development of increased intravascular pressure which led to the rupture of a vessel, probably weakened from disease (arteriosclerosis).

Homan informs me that he had had dizzy spells before when he was lifting great weights, or when he has worked in a position corresponding to that which brought on the present attack. He informs me that similar attacks of dizziness are not rare among workmen. His experience in his work, however, has dealt for many years with a fellow workman past the middle period of life.

The attorney for the employee argues that, upon all the evidence, the committee must find that the employee received a personal injury arising out of and in the course of his employment, and cites, among other cases, that of Driscoll v. Employers' Liability Assurance Corporation, Vol. 1, Massachusetts Workmen's Compensation Cases, page 125. In the

Driscoll case, however, the Board decided that the employee was exposed to a substantially increased risk owing to his employment, and that the injury therefore arose out of and in the course of his employment. Driscoll had an "epileptiform attack," and fell from a wagon, sustaining a fractured skull, the fracture of his skull causing his death. It cannot be said, however, that the employee Homan was subjected to a materially increased risk by reason of his employment. He was performing the work at hand in the customary way. He was not under any unusual strain, and the fall had no connection with the cerebral hemorrhage which caused his incapacity for work, said cerebral hemorrhage having occurred, on the medical evidence, prior to, rather than after, the fall of the employee. Such an occurrence might have happened to this employee at any time, independent of his employment, there being no causal relation between the cerebral hemorrhage which caused the fall and said employment. The employee had, upon the medical evidence presented, kidney disease, a very high blood pressure, tortuosity of blood vessels and Bright's disease, all of which predisposed him to cerebral hemorrhage. His physical condition, and not a personal injury arising out of the employment, caused his incapacity for work.

The committee of arbitration finds, upon all the evidence, that the employee, Henry Homan, was not incapacitated for work by reason of a personal injury arising out of and in the course of his employment, and further finds that his employment was not a material contributing cause of the cerebral hemorrhage which incapacitated the said employee for performing his usual work.

The employee's requests for rulings, hereto attached, are refused.

JOSEPH A. PARKS.

HORACE G. PENDER.

Claimant's Requests for Rulings.

1. The injury to the claimant arose out of his employment.
2. The claimant's dizziness was brought on by the work in which he was engaged.
3. The hemorrhage of the claimant was brought on by the work in which he was engaged.
4. The present condition of the claimant was brought on by the work in which he was engaged.
5. The claimant's fall was caused by the work in which he was engaged.
6. The claimant was exposed to a substantial increased risk by reason of his position under the desk.
7. Upon all the evidence the claimant's injury was caused by and arose out of the employment in which he was engaged.

By his Attorneys,

McVEY & McVEY.

Dissenting Opinion.

The undersigned is unable to agree with the majority of the Board.

Edward J. Connolly testified that he was working in the basement where Henry Homan was working on Jan. 25, 1914. He looked where Homan was working and saw him lying on the floor. He asked what was the matter, and Homan told him that he became dizzy while working under a desk, on which he was screwing the top; that he got up and because of the dizziness fell and struck his head on the floor, and that his paralysis was brought on by said fall.

Hormadis LeClair, M.D., testified that he treated Henry Homan, and that a fall of the nature described by Connolly could bring on paralysis, and that if a man fell to the floor and struck the back of his head, that fall might bring on cerebral hemorrhage, and that hemorrhage caused paralysis.

Dr. Timothy Leary, medical expert, in his written opinion said that the position in which Henry Homan was working beneath the bench, and the cramped and unusual position of the head, he believed to have been responsible for the develop-

ment of increased intravascular pressure which led to the rupture of a vessel. Dr. Leary also stated that Homan told him that similar attacks of dizziness were not common among workmen, and that he had similar dizzy spells before when he worked in a position corresponding to the one in this case.

Henry Homan testified that he was seated underneath the desk and his limbs were in a position higher than his head, in a cramped position, and after some time he became dizzy, and getting on his feet to a standing position he fell to the floor because of dizziness and struck his head, and immediately after striking his head he became paralyzed, and that other men at times when working in the same cramped position under a desk became dizzy.

I find as a member of the arbitration committee that there was causal connection between the manner in which the employee had to perform his work and the injury received by him.

The medical expert, named by the chairman, in his opinion stated that working in a cramped position under a desk would be an adequate cause for intravascular pressure, leading to the rupture of a blood vessel, causing paralysis. However, the employee must establish that the injury for which he claims compensation arose out of and in the course of his employment. His physical condition at the time the injury was received is immaterial, for at common law, if this was an action for negligence, independent of the Compensation Act, it would have been no defense to the employer that if Homan was in good health he would not have suffered the injury for which he claims compensation.

The only evidence adduced as to the cause of the injury was by the employee, who stated that he became dizzy, and that it was not customary for him to become dizzy while working for his employer, but that the position in which he was working at the time brought about the dizzy condition from which the injury resulted.

In the Driscoll case it was held that the driver of a wagon occupying the usual position that all drivers assume was "exposed to a substantial and increased risk owing to the position in which he had to work."

In the above case it was not stated that driving a wagon caused "epileptiform attacks."

However, in the present claim the peculiar position of the employee was a substantial and increased risk, which constitutes an injury within the meaning of the Compensation Act, and entitles the employee to compensation therefor.

EDWARD M. SHANLEY.

Finding and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties and their witnesses in the Hearing Room, New Albion Building, Boston, Mass., on Thursday, Jan. 14, 1915, at 10 A.M., and revising the findings and decision of the committee of arbitration, finds and decides as follows:—

This case was heard as an entirely new matter, and the following is a report of all the material evidence presented at the hearing on review. The findings and decision of the Board are based solely upon the evidence presented at this hearing.

There was no dispute as to the average weekly wages of the employee, which were \$14.

Henry Homan, 58 Bowdoin Avenue, Dorchester, testified:—

The last day I worked for the New England Office Furniture Company was Jan. 27, 1914. I was working this day on a mahogany desk, 5½ feet long and 5 feet wide. I was screwing the top on. I had to use screws ¼ inch longer than were in it originally. They worked awfully hard. In putting the last one in I got dizzy, and getting out I got so dizzy I reeled and fell and struck the back of my head against the bench. That is all I knew until my shopmate, who must have heard it, came in and helped me up. He bathed my head in hot water and alcohol and they took me home after that. It was a table desk that I was working on. The desk was about the regulation height. I was in that position underneath the desk about twenty minutes. I put in four new screws ¼ inch longer than the originals. I have never been ill except when I had the scarlet fever, when I was about three years of age. I never had to give up work. In getting from underneath the desk I stood up about halfway and then I fell backwards. I struck on the edge of the bench. I hit the back of my head. In using force to put this 1¼-inch screw in, the strain came on the base of the brain. The screwdriver I used was 12 inches long.

I have been working in this business since I have been fifteen years of age. I have built a good many desks. Taking old desks and repairing

them was largely the work done at the New England Office Furniture Company. I have repaired a great many desks. The bulk of my work at the New England Office Furniture Company was repairing desks. In most every case of repair I took the old screws out and put in new screws that were longer. I had done this a great many times before this day. It was nothing new whatever for me to get under a desk and screw new screws into old holes. I had worked there about thirteen or fourteen years. During the year it would average about four or five times a week that I had to do this thing. Whenever that work was required, I did it. There was nothing unusual or different in my position this time than at other times. It was a common thing for men who were in the same position under the desk to get dizzy. I have become dizzy before when in that same position. This mahogany desk was not any harder mahogany than most mahogany desks. I did not notice any other men fall over and had not fallen myself before.

Edward J. Connolly, 159 D Street, South Boston, Mass., testified: —

I have been in the employ of the New England Office Furniture Company for five or six years. I remember the last day Mr. Homan worked there. I happened to look into the room where he was working and saw him lying on the floor. I went in and asked him what the matter was, and he said he was hurt. He had hit his head on a large wood vise on the bench. I carried him over to the tool chest and put hot water to the back of his head, and put hot alcohol on it afterwards. I told the boss the condition Homan was in and he sent for an automobile and sent him home. I have worked in the same position. When you work under one of those desks you would naturally be dizzy when you got out. On every occasion when I got up my head would be dizzy.

I saw this Homan lying down on the floor and I saw where the desk was. I saw the way the desk was fixed and located. The desk was not upside down on a horse. That is my signature. I meant to rectify the mistake about the desk being upside down on a horse. I read that statement over and signed it. I testified before the committee of arbitration. I was asked about this statement. The desk was not on horses. It was a polished desk and they do not put them on horses. I said that because I was excited. I certainly retract what I said then. I testified to the fact that I saw him lying down. There are numerous desks in the room where he was working. As a matter of fact, I do not know what desk he was working on. I did not see him until after he fell down. No desk with a polished top is put on horses. No one has asked me to change my testimony.

Dr. Patrick J. Kingsley, 5 Adams Street, Dorchester, Mass., testified: —

I have been a practising physician for twenty years. I never saw Mr. Homan until this morning. I have read over Dr. Leary's report. I have probably treated about 200 cases of paralysis. I have had one year of hospital training. I think the main point in this case has been lost. The position of the head has been dwelt upon. It has little or no bearing on the case. Assuming he was in the position as described, there would be a necessarily increased abdominal pressure which would press the blood from the large vessels in the abdomen into the smaller ones, causing an increased blood pressure on the peripheral or superficial blood vessels. The cause of his fall, if he did fall as described, would be due to a sudden recession of blood from the brain, upon rising to another position, to take the place of the displaced blood in the large abdominal vessels, causing an acute anæmia of the brain, which would account for the dizziness which he felt upon rising. Whether or not the cerebral hemorrhage was caused by the position of the patient, causing an increased peripheral blood pressure, or caused by the fellow falling, or by anæmia of the brain which caused dizziness producing the fall, is purely a matter of opinion. It might be due to the one or due to the other. I could not say and I do not see how any other physician could say that the hemorrhage was the result of a fall or of increased pressure due to position. If due to the position, the hemorrhage might have started, but not with enough pressure to produce the hemorrhage so that he might be able to rise. It is possible that the fall could cause the hemorrhage. When he fell he hit the "occiput," commonly called the base of the brain. It is possible that a blow there could produce a condition of paralysis in the left side. The location of the blow does not determine the location of the hemorrhage. This man told me he was sixty-two years old. I would attribute it more to the interabdominal pressure rather than to a cramped position of the head. A cramped condition of the head would cause a venous congestion rather than an arterial congestion. A venous congestion would not predispose toward a cerebral hemorrhage, as an arterial congestion would. As to whether the blood vessels were diseased or not, he states he was suffering from arterial sclerosis. A person suffering from arterial sclerosis is more liable to have a hemorrhage from increased blood pressure than a younger person who is not suffering from it. I agree with Dr. Leary that the hemorrhage preceded the fall, but the fall might be caused by a sudden recession of blood from the brain which had emptied by interabdominal blood pressure. A hemorrhage occurring in the brain causes no symptom until there is sufficient pressure from that hemorrhage. He might have arisen before there was sufficient blood escaped to cause any immediate symptom. The question why did he fall would be explained by the fact of the sudden anæmia of the brain, plus the disturbance due to the hemorrhage if the hemorrhage had occurred before he arose. It is my opinion that the fall was caused by the hemorrhage rather than the hemorrhage by the fall. My opinion is that the probabilities are that that hemorrhage occurred while he was under the desk as a result of increased interabdominal pressure, and that the fall had nothing to do with his present condition.

I maintain that the hemorrhage preceded the fall, and it occurred while he was under the desk. The reason he did not fall while under the desk is because there was not sufficient hemorrhage to cause paralysis. The dizziness was caused by the sudden recession of blood from the brain to fill the empty blood vessels, causing anæmia of the brain, which accounts for the dizziness and fall. I maintain that there is a rupture of the blood vessels in the brain; it continues to bleed and the damage has not been repaired, although the pressure has been lessened. The paralysis could not have been complete enough to prevent him from rising. Everybody is subject and likely to have attacks of dizziness when they have some compression of an artery. In a normal man no ill effects are to be expected. A sudden altering of the position causes a sudden change in the blood flow. The altered position he was in and the force required to drive the screw would require contraction of abdominal muscles.

Timothy Leary, M.D., of Boston testified: —

I examined Mr. Homan, and at the time I saw him he had had a cerebral hemorrhage. The story he told me was that he had noticed in doing work requiring muscular effort that he had developed some dizziness in recent years. He told me that on the day in question he was working under a desk, screwing the top on, and that he became unconscious and was picked up by a fellow workman; or rather he got up, staggered and fell, striking his head on a bench, was picked up by a fellow workman, later was treated at the City Hospital and afterwards transferred to his home. I found no evidence that his condition was due to traumatism. I concluded the cause of his condition was this: he is a man of some age, and inevitably it was going to come to the sort of thing it did come to,— that some day he would have a shock, how or where was the question; that the dizziness he had suffered from evidenced that shock would be expected; that his strained condition under this desk probably was the immediate agency which brought about the attack which was going to come anyway. Shocks arise usually in relation to some incidental agency that increases the blood pressure temporarily. It is my opinion that at fifteen, twenty, thirty or forty years of age he might have done that sort of thing indefinitely, without any danger of a vessel rupturing; but he gave no evidence in the history of dizziness he had suffered from, in connection with any unusual stretch, which showed that he was getting ready for a cerebral hemorrhage, and the unusual stress which he describes, necessarily occurring in the screwing on a flat top of a heavy desk, in my opinion was the match which had to do with the lighting of the fire. The fuel was all there, everything was prepared, all it needed was something to touch it off. It was a usual strain, part of the wear and tear of his work. This strain, in my opinion, would not have had any effect on a normal man. This man had rather advanced arterial sclerosis, from the fact that he

had a hemorrhage. His peripheral vessels are not enlarged. We find cases where the arteries in general circulation are good, but the brain arteries are in bad condition. It would come surely, it might come, from almost any cause. By any cause I mean any agency which will temporarily increase his blood pressure. By that I mean fright, strained position, physical stress, — any of these agencies would be capable. Unusual in the sense that it is something you are not doing every hour or every day, but something unusual in the hour's work. I got the impression that he had not been putting many of these desks together at that particular time, and it was a little unusual stress. It might not affect you or me, but by reason of his arterial condition would bring about this thing. You stoop over and fasten your shoes and then straighten up quickly; there is something we can appreciate. It is possible that this pressure could have been brought on by the cramped condition of the abdomen. As a matter of fact, I do not know, but in my opinion the twisted head position would perhaps cause it more than the abdominal position. The position of the head was not unusual for a man to put screws into a table, but I would want to put it as more unusual than tying shoes. Although the position would have to be continued longer than to tie the shoes, it is the same thing. There must have been one or two things. Either the vessel had reached a point where it would more easily rupture, and that is unreasonable, or something produced a higher pressure than he had before in order to produce the rupture. I think abdominal compression could produce it, or the mere changing of the position of the head from a long-continued, strained condition. Something caused the ruptured blood vessel, that is, a strain might have caused it. The position he was in might cause an increased blood pressure on the brain. In my opinion his position was cramped and unusual.

The evidence shows that the employee, Henry Homan, received a personal injury arising out of and in the course of his employment by reason of a strain which materially accelerated a condition of arterial sclerosis and totally incapacitated the employee for the performance of work, said strain resulting from the peculiar and unusual condition in which the employee was required to perform his work at the time said injury occurred, and causing a cerebral hemorrhage which terminated his working capacity.

The Board finds that the strain of forcing the screws into place which fastened the top of the mahogany desk, combined with the unusual position underneath the desk in which the employee was obliged to work, was the immediate and causative factor which brought about the rupture of the cerebral

artery and totally incapacitated him for work, said strain and rupture being a personal injury arising out of and in the course of the employment of the employee, Henry Homan. (Clover, Clayton & Co., Ltd., 3 B. W. C. C. 275; House of Lords, M'Innes v. Dunsmuir & Jackson, Ltd., 1 B. W. C. C. 226; Colder v. Caledonian Railway Co., 40 Sc. L. R. 89; Lloyd v. Sugg, 2 W. C. C. 5.)

The Board therefore finds, upon all the evidence, that there is due the employee, Henry Homan, a weekly payment of \$7, this being one-half his average weekly wages, dating from Feb. 10, 1914, the fifteenth day after the injury, and continuing during his total incapacity for work, in accordance with the provisions of the statute.

DUDLEY M. HOLMAN.

DAVID T. DICKINSON.

THOMAS F. BOYLE.

JOSEPH A. PARKS.

CASE No. 897.

JOHN YUKANOVITCH, *Employee*.

GENERAL ELECTRIC COMPANY, *Employer*.

MASSACHUSETTS EMPLOYEES INSURANCE ASSOCIATION, *Insurer*.

INCAPACITY FOR WORK DUE TO UNREASONABLENESS OF EMPLOYEE IN REFUSING TO ACCEPT OPERATION.

The employee received a personal injury while lifting a bale of scrap metal, by reason of which a condition of hernia developed in the right inguinal region. Compensation was paid for a period of two months, at the end of which time the insurer offered an operation for the radical cure of the hernia without cost to the employee. This was declined by the employee after a certain period of time had been given in which to consider the offer, and after having been informed that a refusal would be regarded as unreasonable by the committee. *Held*, that the employee is not now incapacitated for work by reason of the injury.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of John Yukanovitch v. Massachusetts Employees Insurance Association, this

being case No. 897 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Joseph A. Parks, representing the Industrial Accident Board, chairman, John C. Jones of Boston, representing the insurer, and Frederick W. Ringdahl of Lynn, representing the employee, heard the parties and their witnesses at City Hall, Lynn, Mass., on Monday, June 1, 1914, at 10.30 A.M.

John Yukanovitch, the employee, received a personal injury on March 19, 1914, while lifting a bale of scrap metal, by reason of which a condition of hernia resulted in the right inguinal region. The insurer paid compensation, based upon his average weekly wages of \$9.43, weekly up to and including May 24, 1914, at which time payments were suspended because of the refusal of the employee to submit to an operation for the radical cure of the hernia. The only question involved in this case, therefore, was the reasonableness of the employee in declining to consent to the performance of the operation.

The employee testified through an interpreter that he understood the insurer would furnish an operation without charge, and that he would be paid his weekly compensation during the incapacity for work following the operation. He also acknowledged receipt of the report filed by the impartial physician appointed by the Board, Dr. Frederic J. Cotton, who advised an operation, and stated that the same would restore him to normal physical efficiency again. He further stated that he would not accept the operation, no matter what might happen, and that he believed that it would not benefit him.

Dr. Frederic J. Cotton, the impartial physician appointed by the Board, stated that the physical examination showed a healthy young man, who should have an operation to avoid risk and trouble.

The committee of arbitration agreed to give the employee a week to consider the offer of the insurer to provide an operation without cost and pay compensation during incapacity. On June 9, 1914, eight days after the hearing, the committee was notified that the employee had not consented to the operation.

The committee of arbitration therefore finds, upon all the evidence, that the employee is not now incapacitated for work

by reason of the personal injury received on March 19, 1914, any incapacity from which he is now suffering being due to his unreasonableness in refusing to accept the operation offered by the insurer. The committee therefore finds that no further compensation is due the employee after May 24, 1914, and during the period of his unreasonable refusal to accept said operation, reserving the right to the parties to come before the Board on review, as provided by Part III., section 12, of the act, should the said employee agree to an operation for the cure of the hernia at a later date, and the rights of the insurer are not prejudiced by the employee's unreasonableness.

JOSEPH A. PARKS.

FREDERICK W. RINGDAHL.

JOHN C. JONES.

CASE No. 909.

LUCY MCHENRY, *Employee.*

PACIFIC MILLS, *Employer.*

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, *Insurer.*

PERSONAL INJURY TO EMPLOYEE WHO ASSISTS FELLOW EMPLOYEE TO REMOVE PAINT WHICH WAS PLACED ON SPINDLE IN SPIRIT OF FUN NOT COVERED BY STATUTE.

The evidence shows that the employee would not have received the personal injury which incapacitated her had it not been for the fact that she and another employee had been scraping paint from a spindle which the latter, in a spirit of play, had painted just before luncheon time in the mill owned by the subscriber.

Held, that the injury did not arise out of and in the course of the employment.
Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to Supreme Judicial Court.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Lucy McHenry v. American Mutual Liability Insurance Company, this being

case No. 909 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Joseph A. Parks, representing the Industrial Accident Board, chairman, Michael S. O'Brien of Lawrence, representing the employee, and Louis S. Cox of Lawrence, representing the insurer, heard the parties and their witnesses at the Court House, Lawrence, Mass., on Monday, May 18, 1914, at 2 P.M. John C. Sanborn appeared for the employee.

It was agreed that Lucy McHenry, the employee, was a doffer in the employ of the subscriber; that her average weekly wages were \$7.02; and that she received an injury to the index finger of her right hand by reason of which the terminal phalanx was removed, the only question being whether the injury resulted from larking or arose out of and in the course of the employment of the claimant.

Lucy McHenry testified that she had been employed at the Pacific Mills about six months as a doffer and carder. She was injured about five minutes before 12 on March 11, 1914, and had finished her work at the doffing machine about a quarter-past or half-past 11. She was accustomed to eat her luncheon in the mill. No objection had ever been made to this custom, and the girls were allowed to use the "bands" to warm their tea. She had got the band to tie around her bottle and drop it into some hot water to warm the tea. She was sitting on a box near the bobbin painting machine, not far from it, waiting for 12 o'clock to ring, and had the band in her hand. She was just going to get up to warm the tea when the band she had in her hand got caught on the spindle of the painting machine and drew the finger into the machine. The machine had been in use that morning until about half-past 11, but the belt had not been taken off. The band she used had been taken from a spinning machine and had nothing to do with the bobbin painting machine, nor had her work anything to do with this machine. She and Anna Gray always sat there, and she had been sitting there about twenty or twenty-five minutes. Anna had put a band like that around the spindle, but she had not. She had been trying to remove some paint from the steel spindle before she got hurt, but that was about five or ten minutes

before; she had stopped trying to get it off. She said she had put a band around the spindle, but she was not doing that when she got hurt. She identified her signature to a statement submitted by the insurer, but she had not written the statement nor read all of it before she signed it. She was not feeling well when she signed it. She thought it was true at the time. It was dated April 4, 1914.

George W. Kenney, who investigated the case for the insurer, testified that he went to the home of the employee to get the statement. He had found out at the mill how the accident happened. He had written the statement himself, but had asked the employee questions. It is the custom of the insurer to investigate only those cases which on the face of them look unusual, and there was a statement on the report of the case that led him to believe that the accident did not arise out of the employment; it gave the cause as "fooling with painting machine."

Miss McHenry, being recalled, testified that she had not told Mr. Kenney that she got her finger caught by fooling with the machine, and the accident did not happen as it read in the statement.

Mrs. McHenry, the mother of the employee, testified that she was present at the visit of Mr. Kenney, and that he told her daughter everything first himself and then wrote it down, and that Lucy had told him that she had the band in her hand and it got caught in the spindle in some way and pulled her hand in; that is what she had told her mother.

Anna Gray, an employee of the Pacific Mills, testified that she was a doffer in the same room with Lucy McHenry, and was with her when the accident happened. She said that the painters leave the mill about a quarter to 12. These bands are put around the cylinder to pull the spindle around. They were fooling there, and had finished their work between 11 and 11.30. They happened to notice this place and sat down there. She went first and made a motion to Lucy to come over. The painters had left a stick there with paint on it. The painters place the bobbin on a spindle, which is revolved by means of a shaft and belting, and coat the bobbin with paint. Seeing the spindle revolve, she took the stick and put paint on the

spindle. After she had it all painted she could not get a bobbin on, and she asked Lucy McHenry to come and help her take the paint off before the painters returned. She got a band, Lucy already having one which she intended to use to warm her tea. They got all the paint off and she threw her band away. Miss McHenry, however, retained hers. "When Lucy took her band off near the shaft there, she thought she had it right in her lap; but she was watching me, and when I got the bobbin on, it caught the loose end of the band and brought it around. Lucy was just going to get up. The speed was kind of slow and the band was going around loose before; and when I put the bobbin on, Lucy's finger was caught." Ten minutes had elapsed between the time they were painting and the time Lucy was hurt.

E. D. Wells, boss spinner at the Pacific Mills, testified that Lucy McHenry was a filling doffer, with duties confined entirely to the spinning frames; she had nothing to do with the painting machine, nor had Anna Gray. It was customary for the girls to warm their tea or coffee by the method of taking one of these bands and tying the band to the receptacle and dropping it into hot water. When the doffers finish their work they are allowed to go out if they wish; they may go home to dinner if they wish to. It did not make any difference where the girls stayed; seats were provided for them to sit upon. There was plenty of room — spare floor — for them to sit at that end of the room. He would not call the painting machine a dangerous one; he never supposed any one could get hurt on it; it was quite out of the ordinary that this should have happened.

Lucy McHenry, being recalled, testified that she had listened to what her friend Miss Gray had said, and had heard her description of the accident, and, being asked if she remembered enough about it to say whether it was a correct story or not, said, "I do not remember every bit how it happened; she must know better than me, because I do not remember. I did not think I had my finger off at all." As she thought about it afterwards "it seemed as if a loop caught in her finger."

Upon all the evidence the committee of arbitration finds that the injury to the employee, the said Lucy McHenry, did not

arise out of and in the course of her employment. The evidence shows that she and her fellow employee, Anna Gray, were fooling, and that as a result of said fooling the injury resulted. The fact that there had been a lapse of ten minutes between the time that the paint was taken off the spindle and the injury does not bring the injury within the act, the evidence showing that the band became caught in the spindle as a result of the larking in which the employees had been engaged, and as a direct result of said larking causing the injury to the claimant. No compensation is due, therefore, to the said Lucy McHenry, and her claim for compensation is dismissed.

JOSEPH A. PARKS.
LOUIS S. COX.

Michael S. O'Brien dissents.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, New Albion Building, Boston, Mass., Thursday, June 25, 1914, at 10.15 A.M., and affirms and adopts the findings and decision of the committee of arbitration.

The evidence shows that the employee, Lucy McHenry, would not have received the personal injury which incapacitated her, had it not been for the fact that she and another employee, Anna Gray, had been scraping paint from a spindle which the latter, in a spirit of play, had painted just before luncheon time in the mill owned by the subscriber. She and Miss Gray made use of pieces of cotton banding in their efforts to remove the paint, and after that had been done to their satisfaction, the employee, Miss McHenry, sat down with one end of the piece of banding in her lap. The other end had, however, been left attached to the spindle, and when Miss Gray put a bobbin on said spindle it clamped the banding tightly. The revolving spindle gradually tightened its hold upon the banding, the other end having previously become entangled or twisted about the finger of Miss McHenry, and the employee's finger tip was snapped off.

The painting of the spindle by Anna Gray was performed in a spirit of fun, and was not in the course of her employment; the removal of the paint by the said Anna Gray and the employee, Lucy McHenry, was not in the course of their employment; and the resulting personal injury to the said Lucy McHenry did not arise out of or occur in the course of her employment, since it was neither incidental to said employment, nor any part of the duty of the said employee, to paint spindles or to remove paint from said spindles. As it was by reason of her act in removing the paint from the spindle that the employee, Miss McHenry, received the injury, and said act was outside the sphere of her employment, the Board finds that the employee did not receive a personal injury arising out of and in the course of her employment, and dismisses her claim for compensation.

JAMES B. CARROLL.

DUDLEY M. HOLMAN.

EDW. F. MCSWEENEY.

Findings and Decision of the Industrial Accident Board on Review.

The attorney for the employee having requested the Board to revise its findings and decision previously filed, the Industrial Accident Board heard the parties at the Hearing Room, New Albion Building, Boston, Mass., Thursday, July 16, 1914, at 11.30 A.M., and, revising the previous findings and decision of the Board on review, finds and decides as follows: —

The evidence shows that the employee, Lucy McHenry, would not have received the personal injury which incapacitated her had it not been for the fact that she and another employee, Anna Gray, had been scraping paint from a spindle which the latter, in a spirit of play, had painted just before luncheon time in the mill owned by the subscriber. It was customary for the employees to eat their luncheon at this place and take their tea there, using bands to warm the tea, no objection having been made to this practice. Miss Gray, alarmed at the possibility of the foreman seeing her, asked Miss McHenry to help her to get the paint off the spindle, telling her that if the boss caught her she would lose her place. They

made use of pieces of cotton banding in their efforts to remove the paint, and after that had been done to their satisfaction, the employee, Miss McHenry, sat down with one end of the piece of banding in her lap. The other end had, however, been left attached to the spindle, and when Miss Gray put a bobbin on said spindle it clamped the banding tightly. The revolving spindle gradually tightened its hold upon the banding, the other end having previously become entangled or twisted about the finger of Miss McHenry, and the employee's finger tip was snapped off. A period of ten minutes had elapsed between the taking off of the paint by both employees and the injury to the finger of Miss McHenry. This injury occurred on the painting machine, and neither of the employees was employed on that machine or had any work to do in connection with it. Lucy McHenry's age is nineteen; Anna Gray's age, eighteen.

The painting of the spindle by Anna Gray was performed in a spirit of fun, and was not in the course of her employment; the removal of the paint by the said Anna Gray and the employee, Lucy McHenry, was not in the course of their employment; and the resulting personal injury to the said Lucy McHenry did not arise out of or occur in the course of her employment, since it was neither incidental to said employment, nor any part of the duty of the said employee, to paint spindles or to remove paint from said spindles. As it was by reason of her act in removing the paint from the spindle that the employee, Miss McHenry, received the injury, and said act was outside the sphere of her employment, the Board finds that the employee did not receive a personal injury arising out of and in the course of her employment, and dismisses her claim for compensation.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 917.

DORIS PAULINE CARTER, DAUGHTER AND DEPENDENT OF JOHN W. CARTER (DECEASED), *Employee*.

AUTO CAR COMPANY, *Employer*.

TRAVELERS INSURANCE COMPANY, *Insurer*.

DAUGHTER OF EMPLOYEE, WHO LIVED WITH HER MOTHER, AND RECEIVED A WEEKLY CONTRIBUTION FROM HER FATHER, FOUND TO BE WHOLLY DEPENDENT UPON HIM FOR SUPPORT. DEPENDENT'S MOTHER LIVED APART FROM HUSBAND. INSURER APPEALS CASE TO SUPREME JUDICIAL COURT.

The evidence showed that the employee contributed from \$4 to \$5 weekly to the support of the claimant, his daughter, who suffered from heart trouble and acute indigestion, and who was physically incapacitated for earning wages. She was over eighteen years old, and had worked only one week during the year preceding the death of her father.

Held, that she was wholly dependent upon the employee for support.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to Supreme Judicial Court.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Doris Pauline Carter, daughter of John W. Carter, *v.* Travelers Insurance Company, this being case No. 917 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Dudley M. Holman of the Industrial Accident Board, chairman, Harvey P. L. Partridge, representing the dependent, and William C. Prout, representing the insurer, heard the parties and their witnesses in the Hearing Room of the Industrial Accident Board, 1 Beacon Street, Boston, Mass., on Tuesday, May 11, 1914, at 2 P.M.

It was agreed that John W. Carter was working for the Auto Car Company, which was insured in the Travelers Insurance Company; that on Dec. 20, 1913, he received an injury in the course of and arising out of his employment, from which he died two days later. His average weekly wage at that time was \$14. The only question was one of dependency.

Doris Pauline Carter testified that she lived in Portland, Me., at 101 Danforth Street; that she is eighteen years of age; that she was eighteen on the 20th of October, 1913, and that she was the daughter of John W. Carter. During the three years just prior to her father's death she was living at 139 Spring Street, Portland, Me. At the time of her father's death her mother and father were not living together; they had not been living together for three years. During that time they had not lived together as husband and wife. For three years prior to her father's death she had worked, substituting — she never worked steadily — for a florist. She worked this last Easter for one week. Before her father's death she had been a waitress at the English Tea Room; that was about three years ago; she could not stay because her health was not good. Two years ago she went to a commercial school. She went there five months. Her father paid \$10 a month for her schooling, and he sent her about \$4 a week. She left that school in June, 1912, and up to the time that her father died, in 1913, she had worked in the florist's store one week, and during that year and a half she had substituted at Wilson's for a week as a clerk; the rest of the time she was at home sick. She doctors with Dr. Eagan. She was living with her mother. They did not have to pay rent because they boarded a woman; that paid the rent. She and her mother divided the table expenses. Her father sent her \$4 or \$5 a week, and she supported herself with this amount; she bought her clothing and helped her mother. She had no other income except the money that her father sent her. She is not able to work now.

The mother filed a statement, signed before a notary public, in which she stated that she was not dependent upon her husband at the time of his death. She had put in a claim, prior to this, that she was dependent.

Doris Pauline Carter further testified that when her father died she had \$100 saved in the bank. She has spent about \$50 or \$60 since. Other than that she hasn't anything and is not able to work. The doctor tells her that she has heart trouble and acute indigestion.

We find, therefore, as a fact, that Doris Pauline Carter was the daughter of John W. Carter; that while she is over eighteen

years of age she is physically incapacitated and unable to work, and that at the time of her father's death she was wholly dependent upon him; and we find that she is entitled to recover from the Travelers Insurance Company, the insurer in this case, the sum of \$7-a week for a period of three hundred weeks, making a total of \$2,100, beginning with the date of the injury, Dec. 20, 1913; that her mother is not a dependent on her own sworn statement; and that the daughter alone is entitled to recover under the Workmen's Compensation Act as being wholly dependent upon the deceased John W. Carter.

DUDLEY M. HOLMAN.

HARVEY P. L. PARTRIDGE.

WILLIAM C. PROUT.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, New Albion Building, Boston, Mass., on Thursday, Sept. 24, 1914, at 11.45 A.M., and on Thursday, Oct. 15, 1914, at 11.30 A.M., and affirms and adopts the findings and decision of the committee of arbitration.

It was agreed that John W. Carter was working for the Auto Car Company, which was insured in the Travelers Insurance Company; that on Dec. 20, 1913, he received an injury in the course of and arising out of his employment, from which he died two days later. His average weekly wage at that time was \$14. The only question was one of dependency.

It appeared in evidence that the daughter, Doris Pauline Carter, was living in Portland, Me., with the mother at the time of her father's death; that her father and mother had not been living together for three years; that she was eighteen years old on the twentieth day of October, 1913, and that she was the daughter of John W. Carter. For three years prior to her father's death she had worked intermittently, substituting for a florist. Three years before her father's death she had been a waitress in the English Tea Room in Portland, but she could not stay because her health was not good. Two years

before her father's death she went to a commercial school for five months, and her father paid \$10 a month for her schooling and sent her about \$4 a week. She left that school in June, 1912, and up to the time that her father died, in 1913, she had worked only one week in the florist's store, and during that year and a half she had substituted at Wilson's, a Portland grocery, for a week as clerk; the rest of the time she was at home sick. She was living at home with her mother, who boarded a woman in return for the rent. She and her mother divided the table expenses. Her father sent her \$4 to \$5 a week, and she supported herself with this amount; she bought her clothing and helped her mother. She had no other income except the money that her father sent her, and she was not able to work at the time of the hearing. She further testified that when her father died she had \$100 saved in the bank. No information was obtained as to where the \$100 came from. Of this amount she had spent \$50 or \$60 at the time of the hearing. Besides that small amount in the bank she hasn't anything and is not able to work. She has heart trouble and acute indigestion.

The mother filed a statement, signed before a notary public, in which she stated that she was not dependent upon her husband at the time of his death. She had put in a claim, prior to this, that she was dependent.

These facts are all the material evidence that there is in the case.

Mrs. Carter, the widow, received the notification of the Board to be present at the time of the review, but was not present, nor did she intend to be, as the Board is advised.

The Board finds, on this evidence, that the arbitration committee did not err in its finding of fact, and it affirms and adopts the finding of the committee of arbitration. That finding was: —

We find, therefore, as a fact, that Doris Pauline Carter was the daughter of John W. Carter; that while she is over eighteen years of age she is physically incapacitated and unable to work, and that at the time of her father's death she was wholly dependent upon him; and we find that she is entitled to recover from the Travelers Insurance Company, the insurer in this case, the sum of \$7 a week for a period of three hundred weeks, making a total of \$2,100, beginning with the date of the injury,

Dec. 20, 1913; that her mother is not a dependent on her own sworn statement; and that the daughter alone is entitled to recover under the Workmen's Compensation Act as being wholly dependent upon the deceased John W. Carter.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
JOSEPH A. PARKS.

CASE No. 944.

JOSEPH LIMA, *Employee*.

QUINCY MARKET COLD STORAGE AND WAREHOUSE COMPANY,
Employer.

ÆTNA LIFE INSURANCE COMPANY, *Insurer*.

PERSONAL INJURY BY REASON OF STRAIN HAS NO CAUSAL
RELATION WITH BRIGHT'S DISEASE WHICH INCAPACITATES
EMPLOYEE.

The employee received a personal injury by reason of a strain while pulling a bale of burlap, and later became incapacitated for work because of a condition of Bright's disease. The evidence showed that said employee was suffering from a diseased condition of the heart, lungs and kidneys, all symptoms of chronic Bright's disease, having no causal relation with the injury.

Held, that the employee was not entitled to compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Joseph Lima v. Ætna Life Insurance Company, this being case No. 944 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Edw. F. McSweeney of the Industrial Accident Board, chairman, Asa S. Allen, 31 State Street, Boston, representing the insurer, and Joseph Smith, 294 Washington Street, Boston, representing the employee, heard the parties and their witnesses in the Hearing Room of the Industrial Accident Board, New Albion Building, Boston, Mass., Monday, June 8, 1914, at 10 A.M. Wm. H.

Vincent appeared as counsel for the insurer, and the employee was not represented by counsel.

Joseph Lima, the injured man, testified that he was employed as a laborer in the general storage department of the Quincy Market Cold Storage and Warehouse Company, at an average weekly wage of \$13. Said company is insured under the provisions of the Workmen's Compensation Act with the Ætna Life Insurance Company.

On the third day of December, 1913, while pulling a bale of burlap from the elevator into a room on the eighth floor of No. 4 warehouse, he strained himself. The three days following the injury witness worked on light work provided by the assistant manager, to whom he claimed he had said his back ached, and requested lighter work for a few days. The fourth day he was unable to report for work, and was thereafter treated by Drs. Costa and Sissa, and later at the Boston City Hospital by Dr. Joslin.

Lima testified that he had not spoken of the alleged injury to Mr. Merriam, the assistant manager, nor to any of the other men at the immediate time, but did later when he was unable to work. He told Manuel Costa and Joe Silva that he thought the injury above described was responsible for his inability to work; witness further testified that a couple of weeks previous to the injury, and off and on at infrequent periods, he was unable to work, but at the time of the alleged injury was well, and could attribute the condition which followed as due to nothing else but the severe strain of lifting or pulling the bale of burlap.

Manuel Costa and Joseph Silva, fellow employees, testified they saw nothing of the injury described by Lima, and knew about the affair only what he had told them of it.

John Cunningham, another fellow employee, checker for the Quincy Market Cold Storage and Warehouse Company, testified that he had not seen the accident, and it was never reported to him. He knew Lima had been ill at different times during 1913, and that he had been away from work off and on previous to Dec. 1, 1913.

George S. Merriam, assistant manager of the Quincy Market Cold Storage and Warehouse Company, testified that Lima had

worked for him for a number of years, was a faithful employee, and was well liked by him. It was the custom of the company to pay the help when they were out ill for a few days, and this he had done to Lima several times when he was out on account of illness. Lima had never spoken to him about this alleged injury, and the first he knew of the matter was when he found a report on his desk, waiting for his approval so that it might be sent along to the main office. He doubted Lima's last illness, and sent one of the men to Lima's home in East Boston to investigate the matter. This man found Lima in a very sick condition. Mr. Merriam thought, from the man's actions at times when he complained of illness, that he had stomach and head trouble. When Lima finally returned, Merriam found him one morning in the freight car, and asked him how he was feeling. He said he was feeling weak, and a while later said he would have to give up because of pain in his back. Mr. Merriam said, "All right, Joe; you have been a good man, and worked here a good many years, and when you feel like coming back we will find something light for you to do." He continued ill, and during the first of the year the boys took up a subscription for him and gave him \$20. During the three or four years he worked for Mr. Merriam he was one of the steadiest of the men, but on account of illness lost probably two months, all told, off and on.

The report of the Boston City Hospital shows that Lima was suffering from a diseased condition of the heart, lungs and kidneys, and all symptoms of chronic Bright's disease.

The arbitrators find, on the preponderance of the testimony, that the injury as described by Lima as having happened on the third day of December, 1913, could not have produced the condition of disability from which he has since been suffering, and which was found to exist when he entered the hospital on Dec. 23, 1913, to wit: chronic Bright's disease.

The arbitrators further find that all the disability from which Lima has suffered since Dec. 3, 1913, is attributable to the chronic Bright's disease from which he suffered, and that, therefore, the *Ætna Life Insurance Company* is not obligated to pay compensation under the Workmen's Compensation Act.

This decision and all findings regarding compensation or the

existence or termination of incapacity are made subject to review and change by the Industrial Accident Board, if the facts warrant such action, in accordance with section 12, Part III., of the Workmen's Compensation Act, and the general provisions of said act and its amendments.

EDW. F. MCSWEENEY.

ASA S. ALLEN.

JOSEPH SMITH.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, New Albion Building, Boston, Mass., on Thursday, July 9, 1914, at 2 P.M., and affirms and adopts the findings and decision of the committee of arbitration.

The employee, Joseph Lima, claimed to have strained himself while pulling a bale of burlap from the elevator on Dec. 3, 1913, and that his total incapacity for work at the present time is due to the effects of said strain. The report of the Boston City Hospital shows that the employee is suffering from a diseased condition of the heart, lungs and kidneys, all symptoms of chronic Bright's disease.

The Board finds, upon all the evidence, that there is no causal relation between the strain which the employee claims to have received on Dec. 3, 1913, and his present condition, the evidence showing that such a strain would not bring about the chronic condition from which the employee is suffering. The claim of the employee for compensation is therefore dismissed.

JAMES B. CARROLL.

DUDLEY M. HOLMAN.

EDW. F. MCSWEENEY.

CASE No. 986.

FLORINDA PETROSINO, ADMINISTRATRIX OF THE ESTATE OF
CARLO CALIENDO (DECEASED), *Employee*.

ARLINGTON MILLS, *Employer*.

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, *Insurer*.

SUPREME JUDICIAL COURT AFFIRMS FINDINGS OF THE BOARD
THAT MOTHER AND SISTER, WHO RECEIVED AN AVERAGE
MONTHLY CONTRIBUTION OF \$5 TO \$6, WERE WHOLLY DE-
PENDENT FOR SUPPORT UPON THE EMPLOYEE.

This employee was survived by a mother and sister, Celia, in Italy, the former of whom had previously been employed in making stockings and lace, and the latter of whom was blind and unable to perform any work. The mother also lost her vision some time before the injury occurred. Another sister, who lived with her mother, was an apprentice at the tailoring business and earned 6 or 7 cents a day. The family had no other income except the funds which the employee sent home, such contributions averaging between \$5 and \$6 a month. An aunt of the decedent occasionally sent remittances.

Held, that the mother and sister, Celia, were totally dependent.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board affirms and adopts the findings of the committee of arbitration.

Appealed to Supreme Judicial Court.

Decision. — The Supreme Judicial Court affirms the findings of the Industrial Accident Board.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Carlo Caliendo v. American Mutual Liability Insurance Company, this being case No. 986 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of Dudley M. Holman of the Industrial Accident Board, chairman, Walter T. Rochefort, representing the dependents, and Alphonse Cangianno, representing the insurer, heard the parties and their witnesses in the Hearing Room, Court House, Lawrence, Mass., on Tuesday, July 14, 1914, at 10.30 A.M. Vittorini Orlandini appeared as counsel for the insurer, and C. H. Rogers appeared for the dependents.

It was agreed that Carlo Caliendo, the deceased employee, received an injury arising out of and in the course of his em-

ployment on Nov. 22, 1913, while in the employ of the Arlington Mills, which injury resulted in his death on Nov. 27, 1913, and that his average weekly wages were \$6.75.

The only question in dispute was that of dependency.

Florinda Petrosino, an aunt of the deceased employee and administratrix of his estate, testified that Carlo Caliendo had lived with her ever since coming to this country in March, 1913. His father had died about sixteen years ago, and his family consisted of his mother and two sisters, the mother a woman about fifty years of age, one daughter twenty years of age, and the other daughter twenty-two years. They lived in Teano in the Province of Caserto, Italy, and the older sister, Celia Caliendo, came to this country about five years ago and returned to Italy about four years ago on account of having lost the sight of one of her eyes and was not able to see very well with the other. The other sister is learning the tailoring business, and her earnings averaged 6 or 7 cents a day. The mother does work occasionally and looks after the sick girl. The family have no other income except what is earned by this daughter, and they pay 40 cents a month for rent. The deceased employee sent money to his mother, sometimes \$5 and sometimes \$6. At times he sent this money in a letter and at other times he sent it through Frank De Cesare's bank, sometimes sending American money and at other times changing it into Italian money. The deceased employee had worked in the Arlington Mills for about three weeks previous to the time of the accident, and during this period he sent home \$5, and he always told his aunt when he was sending money. Besides working in the mill he used to work at night as a barber with her son, earning about \$4 a week at this work. The last time she saw her relatives in Italy was fourteen years ago, and she was present at the marriage of Carlo Caliendo's parents. His mother had worked at making stockings and laces, but could not do this work now on account of her eyesight. She hears from her relatives in Italy all the time, either by letter or by friends who come to this country from that place, and she has sent money over to Italy to these people four or five times since her nephew's death. Her nephew heard from his mother every fifteen or twenty days, and he sent from \$5 to \$6 a

month to his mother in Italy. She had sent money to her sister-in-law ever since she, the witness, came to this country, approximately forty times, the highest amount being \$5 and the lowest amount \$2. Her husband paid the boy's passage over to this country because she had received a letter stating that on account of the bad conditions there they could not get along very well, and asking that a ticket be sent for the boy to come over to America.

Frank De Cesare testified that he has been in business in Lawrence for fourteen years as a banker and steamship agent; that he remembered on one occasion, on Aug. 21, 1913, that he sent \$12 by draft for Carlo Caliendo; that on another occasion he asked him which would take longer, to send the money by cash or by draft, and that after he, De Cesare, informed him that it would take longer to send it by draft, Caliendo had the money changed into Italian money and sent it by registered letter; that he sent small amounts of money, \$2, \$3 or \$5, three or four times a month in this way; and that this boy's uncle bought the boy's ticket from him on Jan. 4, 1913, paying \$41 for same.

Alexander Petrosino, a cousin of the deceased employee, stated that he was a barber, and that his cousin worked for him for three or four weeks, and as he did not have much experience, he only paid him \$5 a week; that he then went to work in the mills and worked three nights a week for the witness in his barber shop, earning \$3, \$4 or \$4.50 at this work, depending on the business; that he used to tell the witness when he was going to send money home, but that he, the witness, did not pay much attention to what he said, and could not state how much money he sent or how often he sent it.

Tobia Parolisi testified that he worked with Carlo Caliendo in the barber shop; that he had been in this country for nine years and had found the deceased employee a place in the mills; that Carlo Caliendo told him every Tuesday that he used to send money to his mother, but never told him how much, and that he, the witness, knew that Caliendo's people in Italy were awfully poor.

We find on the weight of the evidence and all the surrounding circumstances that the mother and the blind sister were totally

dependent upon Carlo Caliendo for their support; that he regularly sent them money each week, and that his contributions averaged at least \$6 a month, which to people in their circumstances, living in Italy, would wholly support them in the manner in which they had been accustomed to live; that the only other source of income for the mother and the two daughters was what was earned by one of the daughters, and that she received between 6 and 7 cents a day, and that if she had steady work all the time she would have worked twenty-four days in each month, making her total earning capacity \$1.68 per month, and that this was necessary for her own support, and that she could contribute nothing to the support of her mother and her blind sister. We find as a fact, therefore, that the mother and blind sister were totally dependent, and that they are entitled to receive from the American Mutual Liability Insurance Company the minimum of \$4 a week for a period of three hundred weeks from the date of the accident, to be equally divided between the mother and the blind sister.

DUDLEY M. HOLMAN.

WALTER T. ROCHEFORT.

Dissenting Opinion.

I am unable to concur with the majority of the committee in the finding that the mother and the partially blind sister were totally dependent upon the earnings of the deceased at the time of his injury, and respectfully advance the following as representing the grounds of my decision:—

There is nothing in the evidence to show that the sum sent monthly by the deceased to his mother was intended for the support of the mother or of the partially blind sister or of both. This money was sent to the mother to help out the whole family, and it formed one of the modest sources from which the family derived its maintenance; said sources were the money contributed by the son, the money sent by the mother's sister-in-law, Florinda Petrosino, and the money earned by the mother and by one of the sisters.

The mother did not depend for her support solely upon that portion contributed by her sister-in-law or by herself or by one

of her daughters. The same is true of the partially blind sister; that is to say, both depended equally upon the sum total of the various items constituting the family's general income. I cannot, therefore, find that the mother and the partially blind sister were totally dependent upon the earnings of the deceased within the meaning of the law.

ALPHONSE CANGIANO.

Findings and Decision of the Industrial Accident Board on Review.

The claim for review having been filed, the Industrial Accident Board heard the parties at the Hearing Room, New Albion Building, 1 Beacon Street, Boston, Mass., on Wednesday, Sept. 17, 1914, and affirms and adopts the findings and decision of the committee of arbitration. Vittorini Orlandini appeared as counsel for the insurer, and C. H. Rogers appeared for dependents.

Carlo Caliendo, the deceased employee, received an injury arising out of and in the course of his employment on the 22d of November, 1913, while in the employ of the Arlington Mills, and died on Nov. 27, 1913. His average weekly wages were \$6.75 per week.

Surviving him at his former home in Italy is a mother who had formerly worked at making stockings and lace, but could not do this work now on account of her eyesight. He also left a sister, Celia Caliendo, who had formerly lived in America, but went home to Italy about four years ago, having lost sight of one of her eyes and was not able to see well with the other, and was unable to do any work. He left another sister in Italy who was an apprentice at the tailoring business, her average daily wages being 6 or 7 cents a day. The family have no other income except funds which were sent to Italy by the deceased employee, which averaged between \$5 and \$6 a month. It is contended by the insurer that either the mother or sister or both were only partially dependent upon the wages of the deceased employee for their support. It is contended by the representative of the mother and Celia Caliendo that they were both totally dependent upon his wages at the time of his death. The insurer contended that the earnings of the sister, which

amounted to about 6 or 7 cents a day, should be taken into account, and that the mother and Celia depended in part upon the said earnings of the sister for support, and that they also depended for their support on the money that Florinda Petrosino, an aunt of the deceased employee, had sent to the mother's home in Italy.

The evidence shows that Florinda Petrosino had at times sent money to the mother of the deceased employee during a period covering more than fourteen years, the highest amount at one time being \$5 and the lowest amount \$2, and that in all, up to the present, she had sent money about forty times. It does not appear on the evidence when the aunt, Florinda Petrosino, began to send money to the parents of Carlo Caliendo. She was on a visit to Italy about fourteen years ago, and she had sent money to the mother before that time and since, and apparently most of the money that she sent was after the death of the employee. All of the money so paid was in the form of a gratuity. The earnings of the sister who was an apprentice were hardly sufficient to support herself, and there is no evidence to show that any of her earnings were paid to the mother or sister, and we find that there was no dependency either upon the sister or upon the aunt.

We find that the mother and Celia were totally dependent upon the wages of Carlo for support, and we find that there is due from the insurer the amount of \$4 a week from the date of the injury, to continue for a period of three hundred weeks, one-half to be paid to the administratrix for the benefit of the mother, and one-half to be paid to the sister, Celia Caliendo. The requests for rulings hereto annexed were asked for by the insurer, and in so far as they are inconsistent with these findings, they are refused.

JAMES B. CARROLL.
DAVID T. DICKINSON.
JOSEPH A. PARKS.

Insurer's Requests for Rulings.

1. Upon all the evidence the Board must find that the deceased employee left no person or persons totally dependent upon his earnings for support.

2. Upon all the evidence the Board must find that the mother of the deceased workman was not totally dependent upon his earnings for support.

3. Upon all the evidence the Board must find that the sister of the deceased workman, Celia Caliendo, was not totally dependent upon the earnings of the deceased workman for support.

4. If the Board finds that the mother of the deceased workman depended for her means of subsistence upon her earnings besides the earnings of her son, the Board must find that the mother was not totally dependent upon the earnings of the deceased employee.

5. If the Board finds that the mother of the deceased workman depended for her means of subsistence upon the contributions of her sister-in-law, Florinda Petrosino, besides the earnings of her son, the Board must find that the mother was not totally dependent upon the earnings of the deceased employee.

6. If the Board finds that the mother of the deceased workman depended for her means of subsistence upon the earnings of one of her daughters besides the earnings of her son, the Board must find that the mother was not totally dependent upon the earnings of the deceased employee.

7. If the Board finds that the sister of the deceased workman, Celia Caliendo, depended for her means of subsistence upon the earnings of her mother besides the earnings of her brother Carlo, the Board must find that the sister was not totally dependent upon the earnings of the deceased workman.

8. If the Board finds that the sister of the deceased workman, Celia Caliendo, depended for her means of subsistence upon the earnings of her sister besides the earnings of her brother, the Board must find that the sister was not totally dependent upon the earnings of the deceased employee.

9. If the Board finds that the sister of the deceased workman, Celia Caliendo, depended for her means of subsistence upon the contributions of her aunt, Florinda Petrosino, besides the earnings of her brother, the Board must find that the sister was not totally dependent upon the earnings of the deceased employee.

10. If the Board finds that the deceased workman was not the only person to supply his mother and sister Celia with the

means for their subsistence, the Board must find that the mother and the sister Celia were not totally dependent upon the earnings of the deceased employee.

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY,
By its Attorney,
VITTORIO ORLANDINI.

Decree of Supreme Judicial Court on Appeal.

BRALEY, J. "If death results from the injury the association shall pay the dependents of the employee wholly dependent upon his earnings for support at the time of injury a weekly payment equal to one-half his average weekly wages, but not more than \$10 nor less than \$4 a week, for a period of three hundred weeks from the date of injury." (St. 1911, c. 751, Part II., sect. 6.) It was a question of fact whether the mother and sister of the deceased employee, to whose support he had contributed, were wholly dependent upon him within the provisions of the statute. (*Bartley v. Boston & Northern Street Railway*, 198 Mass. 163; *Potts v. Niddrie & Benhar Coal Co.* (1913), A. C. 531, 538.) The evidence shows that they are residents of Italy, and having become unable, by reason of failing eyesight, to follow their usual occupations, were forced to rely wholly upon him for the means of subsistence. The insurer, however, contends that the 6 or 7 cents a day earned by another sister who was a member of the family, and the remittances from time to time to the mother of various sums by an aunt of the decedent, were sufficient to take the case out of the statute. But the findings, that the remittances were mere gratuities, and that the pittance earned by the sister was hardly sufficient for her own maintenance, and that no part was paid to the dependents, who never relied upon either for aid, eliminates those relatives as contributing and dependable sources of support. It being plain on the facts that during his life the mother and sister had no other source of income except his earnings, they were rightly found to be wholly dependent upon the employee, and the rulings requested could not be given. *Pryce v. Penrickber Navigation Colliery Co.* (1902), 1 K. B. 221.)

Decree affirmed.

SPECIAL BOARD CASES.

CASE No. 83.¹

BARNEY GILLEN, *Employee*.

CANADA, ATLANTIC & PLANT STEAMSHIP COMPANY, *Employer*.

OCEAN ACCIDENT AND GUARANTEE CORPORATION, LTD., *Insurer*.

ABILITY OF EMPLOYEE TO EARN HAS BEEN RENDERED NEGLIGIBLE BY REASON OF INJURY, AND HE IS THEREFORE ENTITLED TO TOTAL INCAPACITY COMPENSATION.

The evidence showed that, as a result of the injury, the employee's opportunity to obtain work has been so narrowed that he has found it impossible to get any employment, and his ability to earn has been thereby rendered negligible. The possibility of the said employee obtaining employment is so remote, and the market for workmen of his capacity for performing work so inaccessible, that he is, to all intents and purposes, for the present at least, totally incapacitated for work.

Held, that the employee is entitled to total incapacity compensation.

Findings and Decision of the Industrial Accident Board on Review of Weekly Payments.

This case came before the Industrial Accident Board on review of weekly payments, under section 12, Part III., of the Workmen's Compensation Act, on Thursday, Nov. 13, 1913, at 11 A.M., the insurer claiming that total incapacity for work had ceased.

Dr. William H. Ruddick, who was appointed as the impartial physician under section 8, Part III., of the act to examine the employee, reported in substance as follows:—

My examination revealed signs of fracture middle third right tibia and fibula; fragments of both bones firmly united; line of union very prominent; muscles lower third of femur and leg pale; flabby and somewhat wasted; right instep depressed; right foot flat; right big toe ankylosed at base and swollen tendons contracted; muscles wasted; evidence of fracture of first and second metatarsal bones and outward displacement of these bones, causing well-marked deformity; fairly good joint motion right knee and ankle.

¹ For report of committee of arbitration and findings of Industrial Accident Board, see p. 145, Vol. 1, *Massachusetts Workmen's Compensation Cases*.

This man is fifty-three years old, and his chief disability seems to be confined to his right foot, which will always be deformed, due to the crushing of his instep at the time of his injury.

It will be necessary for him to wear a special boot or some other suitable contrivance to put his foot in shape to enable him to get about. In his present condition he is not fit to work, and in my opinion he will never be able to do longshoreman's work or to follow any similar occupation.

The Board finds upon this report and the evidence of the employee, the said Barney Gillen, that he is totally incapacitated for work.

The evidence shows that the employee, the said Barney Gillen, is totally incapacitated for work as a longshoreman, or for any similar occupation, or for any other kind of work which requires the use of two efficient limbs. The employee has endeavored to obtain, and has been unable to get, any work which the incapacity due to the injury will not prevent him from performing, and has therefore been unable to earn any wages since the time of his injury.

As a result of the injury, Gillen's opportunity to obtain work has been so narrowed that he has found it impossible to get any employment, and his ability to earn has been thereby rendered negligible. The possibility of the said employee obtaining employment is so remote, and the market for workmen of his capacity for performing work so inaccessible, that he is, to all intents and purposes, for the present at least, totally incapacitated for work. The possibility of relief suggested in the report of the impartial physician should be taken advantage of by the insurer, and every effort made to restore the said employee to partial working efficiency.

The Board finds that the said employee is entitled to a continuance of compensation, due on account of his incapacity for work, at the rate of \$6.50 per week, subject to future revision if the employee is furnished or is able to obtain work which the incapacity due to the injury will not prevent him from performing.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 85.

IDA S. NICHOLS, ADMINISTRATRIX OF THE ESTATE OF CHARLES NICHOLS, *Employee*.

WEBBER BROTHERS SHOE COMPANY, *Employer*.

LONDON GUARANTEE AND ACCIDENT COMPANY, LTD., *Insurer*.

MAY ADDITIONAL COMPENSATION, PAID BEFORE DEATH ON ACCOUNT OF CERTAIN SPECIFIED INJURIES, BE DEDUCTED FROM COMPENSATION DUE THE WIDOW? INDUSTRIAL ACCIDENT BOARD RULES THAT NO DEDUCTIONS MAY BE MADE. SUPREME JUDICIAL COURT AFFIRMS DECISION OF BOARD.

The employee received an injury which necessitated the amputation of the third finger of the right hand. Later, blood poisoning set in and death ensued. Under section 11 (d), Part II., the employee was entitled to the payment of half his average weekly wages for a period of twelve weeks, in addition to the payments due on account of incapacity for work, the amputation of the finger being one of the "specified injuries" for which the specified compensation named should be paid "in addition to all other compensation." Subsequent to the payment of the "additional compensation" the employee died, and the insurer requested the Board to rule as to whether the amount paid as "additional compensation" should not be properly deducted from the compensation due the widow.

Decision. — The Industrial Accident Board ruled that the statute makes it obligatory upon the insurer to pay the *additional compensation*, and that no provision is made for its deduction if death results from the injury.

Appealed to Supreme Judicial Court.

Decision. — The Supreme Judicial Court affirms the findings of the Industrial Accident Board.

Agreed Statement of Facts.

This accident occurred Jan. 17, 1913. The injury was blood poisoning, necessitating the amputation of the third finger of the right hand at the middle of the metacarpal bone. Death finally resulted, on April 2, 1913. Deceased was earning \$8.50 per week; entitled to compensation at the rate of \$4.25 per week. He had received during his lifetime twelve weeks of compensation at \$4.25 per week. The question to be determined: "Is insurance company entitled to deduct the twelve weeks' compensation paid him during his lifetime out of three hundred weeks' due him for the death?"

IDA S. NICHOLS,
Administratrix.

LONDON GUARANTEE AND ACCIDENT COMPANY, LTD.,

H. S. AVERY, *Attorney.*

Findings and Decision of the Industrial Accident Board.

The above case was submitted to the Industrial Accident Board on Wednesday, June 18, 1913, upon the foregoing agreed statement of facts, the question involved being whether the insurer had the right, under the Workmen's Compensation Act, to deduct from the compensation due the widow as the sole dependent of the employee the additional payments made during the first twelve weeks after his injury, and prior to his death, for the loss by severance of the third finger of the right hand at the middle of the metacarpal bone, as provided by section 11 (d), Part II., of the statute.

The Board rules, following the English case of *Williams v. Vauxhall Colliery Company, Limited*, 9 M-S 120, that the dependents have a separate and independent right in the event of the employee's death, and that the additional compensation paid under these circumstances cannot be deducted, the said section 11, Part II., providing that "in case of the following specified injuries, the amounts hereinafter named shall be paid in addition to all other compensation," the words "in addition to all other compensation" making it obligatory upon the insurer to pay this additional compensation, and no provision is made for its deduction if death results from the injury.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

Decree of Supreme Judicial Court on Appeal.

BRALEY, J. The injury causing death is stated to have been blood poisoning, necessitating the amputation of the third finger of the right hand at the middle of the metacarpal bone, for which the employee received twelve weeks' compensation in addition to the amount for disability. The insurer contends that the payments for loss of the finger should have been deducted from the compensation awarded to the widow. It is plain under sections 6, 9 and 10 of St. 1911, chapter 751, Part

II., that if weekly payments for total or partial disability had been made to an injured employee before his death, the compensation to dependents begins only at the date of the last of such payments. But section 11 (*d*), as amended by St. 1912, chapter 571, section 2, St. 1913, chapter 448, section 1, chapter 686, section 1, provides that for the loss by severance of at least one phalange of a finger, one-half of the average weekly wage, but not to exceed or fall below a certain sum for each week, shall be paid for a period of twelve weeks in addition to all other compensation. The sections are not repugnant, and the wording is unambiguous. It is common knowledge that a workman may receive personal injuries arising out of and in the course of his employment resulting in disability and entitling him to compensation, although no loss in whole or in part to any member or organ of the body is suffered. The bodily impairment following upon the loss or reduction of normal vision, or the loss wholly or partially of hands or feet as enumerated in the statute, doubtless led, by reason of the permanent character of the disability and the resultant loss of earning power, to putting specifically upon the insurer the burden of additional payments during the periods named, which are declared to be separate from "all other compensation." The statute not having been designed to promote but to decrease the opportunity for unnecessary litigation, its purpose will be best subserved if plain words are given their ordinary signification, and no provision being found in section 6 for any deduction of this amount, the widow as the sole dependent is entitled to compensation from the date of the accident, at the rate, and for the period specified, in the decision of the Industrial Accident Board. (*Cripps' Case*, 216 Mass. 586.)

Decree affirmed.

Decree.

This case came on to be heard after rescript from the Supreme Judicial Court, and upon consideration thereof, and in compliance with said rescript, it is ordered, adjudged and decreed that the London Guarantee and Accident Company, Ltd., the insurer, pay to Ida S. Nichols, widow of and dependent upon Charles Nichols, \$4.25 weekly, as compensation for disability and death, from the date of the last payment to said

Charles Nichols in person of said amount as weekly compensation for disability, but without any deduction for any amount paid to said Nichols because of the loss of his finger; provided however, that all payments, including those made to said Nichols in person, are to be limited to a period of three hundred weeks from the date of the injury, to wit, from Jan. 17, 1913, and that, except as hereby modified, the decree hitherto entered by this court be and the same is hereby affirmed.

By the Court,

HENRY E. BELLEW,
Assistant Clerk.

APRIL 7, 1914.

CASE No. 87.

DANIEL MURPHY OF LANCASTER, MASS., PARTIAL DEPENDENT
OF WALTER MURPHY OF LANCASTER, MASS., *Employee.*
BIGELOW CARPET COMPANY OF CLINTON, MASS., *Employer.*
AMERICAN MUTUAL LIABILITY INSURANCE COMPANY OF BOS-
TON, MASS., *Insurer.*

IF DEATH RESULTS FROM THE INJURY, DEPENDENTS PARTLY
DEPENDENT ENTITLED TO SAME PROPORTION OF WEEKLY
PAYMENT AS AMOUNT CONTRIBUTED BEARS TO ANNUAL
EARNINGS. SHALL VALUE OF BOARD BE DEDUCTED FROM
AMOUNT CONTRIBUTED? INDUSTRIAL ACCIDENT BOARD
RULES THAT BOARD SHALL NOT BE DEDUCTED FROM
AMOUNT CONTRIBUTED. ENTIRE WAGES CONTRIBUTED.
HALF WAGES, OR MINIMUM WEEKLY PAYMENT, AWARDED.
SUPREME JUDICIAL COURT AFFIRMS DECISION OF BOARD.

The employee, a minor, contributed all of his wages, amounting to \$5.67 a week, to his father. The father was not wholly dependent upon the wages of the son for support, for the reason that he worked himself and earned wages and had other children working, but he was partially dependent, and the question is, what amount should be paid the father as a partial dependent, under the Workmen's Compensation Act, the son earning \$5.67 a week and paying all of it to the father? In other words, is the father entitled to the minimum of \$4 a week, or should there be a deduction from the minimum amount, on account of the fact that the employee, while contributing all of his earnings to his father, was supported by the father, and his maintenance was at least \$2.50 a week?

Held, that the employee contributed his entire earnings to the dependent, the proportion contributed being 100 per cent., and that there is due the said dependent 100 per cent. of the minimum compensation provided by the statute; that is, the payment of \$4 a week for three hundred weeks from the date of the injury.

Appealed to Supreme Judicial Court.

Decision. — The Supreme Judicial Court affirms the findings of the Industrial Accident Board.

Agreed Statement of Facts and Questions raised thereon for Decision by the Industrial Accident Board.

Walter Murphy, a minor, fifteen years of age, was employed in the card room of the Bigelow Carpet Company on or about Sept. 20, 1912, and on that date, while taking some waste from a machine, his hand was caught and badly lacerated, this happening in the course of and arising out of his employment, and as a result of said injury death ensued on Sept. 26, 1912.

At the time of the injury the average weekly wages of the deceased were \$5.67, all of which he turned in to his father, Daniel Murphy. There is no claim that either the employee or employer was guilty of serious and willful misconduct.

Daniel Murphy resides in the town of Lancaster. At the time of the injury his family consisted of his wife and nine minor children. Of these children three were at work and earning, in the aggregate, \$21.67 per week, which was turned over to the father. Daniel Murphy himself was employed in a foundry in Clinton and earned in the neighborhood of \$10.50 each week. He maintained the deceased, furnishing him board, lodging and clothing, which cost at least \$2.50 per week. The above was the entire income of the family and was all needed and used for their support, there being no surplus remaining.

On the foregoing facts the parties are agreed. They also agree that Daniel Murphy's claim comes under section 6, Part II., of the Workmen's Compensation Act.

The question on which the parties cannot agree is whether Daniel Murphy is entitled to \$4 a week minimum compensation or some fraction thereof. The insurance company claims that in determining the amount of compensation the fact should be considered that the father paid the expense of the son's maintenance to the extent at least of \$2.50 per week, and therefore could not have been dependent to the full extent on the earnings of the son.

The claimant maintains that this cost of maintenance should

not be deducted from the earnings of the deceased in arriving at the amount contributed by him to the claimant weekly, in calculating the extent of the partial dependency.

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY,
CHARLES E. HODGES,
DANIEL MURPHY,
By GEORGE E. O'TOOLE.

Findings and Decision of the Industrial Accident Board.

According to the annexed agreed statement of facts, Walter Murphy, who was insured under the Workmen's Compensation Act, while in the employ of the Bigelow Carpet Company, on or about Sept. 20, 1912, met with a personal injury from which he died on the 26th of September, 1912. The injury arose out of and in the course of his employment. At the time of his death he was a minor, fifteen years of age, and lived at home with his father, Daniel Murphy, to whom he contributed all of his wages, amounting to \$5.67 a week. The father was not wholly dependent upon the wages of the son Walter for support, for the reason that he worked himself and earned wages and had other children working, but he was partially dependent, and the question is, what amount should be paid the father as a partial dependent, under the Workmen's Compensation Act, the son earning \$5.67 a week and paying all of it to the father. In other words, is the father entitled to the minimum of \$4 a week, or should there be a deduction from the minimum amount, on account of the fact that the boy Walter, while contributing all of his earnings to his father, was supported by the father, and his maintenance was at least \$2.50 a week?

The Industrial Accident Board finds that inasmuch as the sum contributed by the son Walter to his father was the entire weekly wage of the son, and not a fractional part thereof, the father is entitled, as such partial dependent, to the full minimum weekly compensation of \$4 a week, and not to a fractional part of \$4 a week. The Workmen's Compensation Act, section 6, Part II., provides that if the employee leaves dependents only partly dependent upon his earnings for support, there shall be paid such dependents a weekly compensation equal to the same proportion of the weekly payments for the benefit of per-

sons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of his injury. There is no provision in the act which provides for any deduction from an employee's wages when the employee contributes to the dependent all of his wages. The section above referred to provides for a case where only part of the employee's earnings are contributed to the dependent, and the statute gives no rule by which to measure the extent of the compensation due the partial dependent when the employee contributes all of his earnings, leaving it fair to assume that it was the intention of the Legislature in such a case that the rule provided should be adopted; that one-half of the wages of the employee should go to the dependent, which never should be less than the minimum of \$4 per week. Notwithstanding the English case of *Tamworth Colliery Co., Ltd., v. Hall*, 4 B. W. C. 313, in which it was held that the cost of the maintenance of the son and the value to the father of the son's services in the barber business should be taken into account in estimating the amount of compensation belonging to the dependent under the act, we find that there is no provision in our statute for any such deduction. The statute explicitly states that the dependent is entitled to the same proportion of the weekly payments as the amount contributed bears to the annual earnings. Had the amount contributed been \$4 instead of \$5.67, the claimant would have been entitled, under section 6, Part II., to four hundred-fifty hundred sixty-sevenths of the minimum of \$4, that is, to the payment of \$2.82 a week for the statutory period. We therefore find that the deceased employee, Walter Murphy, contributed his entire earnings to the dependent Daniel Murphy, the proportion contributed being 100 per cent., and that there is due the said dependent from the insurer 100 per cent. of the minimum compensation provided by the statute, that is, the payment of \$4 a week for three hundred weeks from Sept. 20, 1912, the date of the injury.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

Decree of Supreme Judicial Court on Appeal.

HAMMOND, J. At the time Walter Murphy was injured he was fifteen years of age and was earning \$5.67 a week, all of which he had been turning in to his father, Daniel Murphy. The latter's family consisted of his wife and nine minor children, including Walter. Of these children three were at work "earning, in the aggregate, \$21.67 per week, which was turned over to the father." The father earned about \$10.50 a week, and these sums constituted the entire income of the family and were "all needed and used for their support, there being no surplus remaining." The father maintained his son Walter, furnishing him board, lodging and clothing, which cost at least \$2.50 a week. The only question is whether the father is entitled to \$4 a week minimum compensation, or some fraction thereof. The insurance company claims "that in determining the amount of compensation the fact should be considered that the father paid the expense of the son's maintenance to the extent of at least . . . \$2.50 per week, and therefore could not have been dependent to the full extent of the earnings of the son." The claimant maintains "that this cost of maintenance should not be deducted from the earnings of the deceased in arriving at the amount contributed by him to the claimant weekly, in calculating the extent of the partial dependency."

The Industrial Accident Board, in rendering its decision, after finding that inasmuch as the sum contributed by Walter was the entire "weekly wage" of the son, and not a fractional part thereof, "the father is entitled, as such partial dependent, to the full minimum weekly compensation of \$4 a week, and not to a fractional part of \$4 a week," uses the following language as explanatory of the grounds of its decision:—

The Workmen's Compensation Act, section 6, Part II., provides that if the employee leaves dependents only partly dependent upon his earnings for support, there shall be paid such dependents a weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of his injury. There is no provision in the act which provides for any deduction from an employee's wages when the employee contributes to the dependent all of his wages. The section above referred to provides for a case where only part of the em-

ployee's earnings are contributed to the dependent, and the statute gives no rule by which to measure the extent of the compensation due the partial dependent when the employee contributes all of his earnings, leaving it fair to assume that it was the intention of the Legislature, in such a case, that the rule provided should be adopted; that one-half of the wages of the employee should go to the dependent, which never should be less than the minimum of \$4 per week. Notwithstanding the English case of *Tamworth Colliery Co., Ltd., v. Hall*, 4 B. W. C. 313, in which it was held that the cost of the maintenance of the son and the value to the father of the son's services in the barber business should be taken into account in estimating the amount of compensation belonging to the dependent under the act, we find that there is no provision in our statute for any such deduction. The statute explicitly states that the dependent is entitled to the same proportion of the weekly payments as the amount contributed bears to the annual earnings. Had the amount contributed been \$4 instead of \$5.67, the claimant would have been entitled, under section 6, Part II., to $\frac{4}{5.67}$ of the minimum of \$4; that is, to the payment of \$2.82 a week for the statutory period. We therefore find that the deceased employee, Walter Murphy, contributed his entire earnings to the dependent Daniel Murphy, the proportion contributed being 100 per cent., and that there is due the said dependent from the insurer 100 per cent. of the minimum compensation provided by the statute, that is, the payment of \$4 a week for three hundred weeks from Sept. 20, 1912, the date of the injury.

We adopt the reasoning of the Board, and there is not much more to be said.

This statute was the beginning of a new kind of legislation, and was dealing with a class of cases involving an infinite variety of circumstances. The Legislature may well have thought that it was not wise to attempt at first to provide a specific rule for every possible case, but simply to provide a few general rules easily understood and easy of application and, as experience dictated, from time to time to make changes. In the present case the father had a large family which he was legally bound to support, and this he was bound to do, whether the children could help or not. The amount contributed by Walter went to help the father in the support of the whole family. Whether it is wise to distinguish as to the support of the individual members of a family in a case like this, as the insurer suggests, is for the Legislature. We think that the conclusion of the Accident Board is in accordance with the language of the statute.

Decree affirmed.

CASE No. 121.¹

BARNARD PORTNOY, *Employee*.

STANDARD GROCERY COMPANY, *Employer*.

FIDELITY AND CASUALTY COMPANY OF NEW YORK, *Insurer*.

APPLICATION OF INSURER FOR PERMISSION TO SUSPEND WEEKLY PAYMENTS DENIED. EMPLOYEE TOTALLY INCAPACITATED FOR WORK BY REASON OF THE INJURY. BOARD RECOMMENDS THAT INSURER MAKE RECOMMENDATIONS OF IMPARTIAL PHYSICIAN EFFECTIVE.

The insurer applied for permission to discontinue the payment of compensation, alleging that the employee was no longer totally incapacitated for work by reason of the injury received on July 3, 1912. The Board referred the employee to an impartial physician, who reported that he was still unable to do the work of a grocery clerk, and recommended that the treatment suggested by the employee's physician be afforded him.

Held, that the employee is now totally incapacitated for work, and a recommendation is made that the insurer furnish necessary medical treatment for the purpose of restoring the employee to normal working efficiency.

Findings and Decision of the Industrial Accident Board on Review of Weekly Payments.

The claim for a review of weekly payments, under Part III., section 12, having been filed, the Industrial Accident Board heard the parties at the Hearing Room, New Albion Building, Boston, Mass., on Thursday, April 16, 1914, at 10.45 A.M., and finds and decides as follows:—

The weekly payments were suspended by the insurer on March 24, 1914, the claim being made that the employee, Barnard Portnoy, was no longer totally incapacitated for work by reason of the injury of July 3, 1912.

John M. Morrison appeared for the insurer, and Maurice L. Marcus for the employee.

The following evidence was introduced:—

Robert C. Gwinn, M.D., stated that he had examined Portnoy, at the request of the insurer, three times since the date of the hearing,—in July of last year and February and March of this year. At the time of the examination in July the move-

¹ For report of committee of arbitration, see p. 212, Vol. 1, Massachusetts Workmen's Compensation Cases.

ment of the arm was limited; when carried above a right angle it caused a great deal of pain, which the doctor attributed to the result of the adhesions from the operation which had been previously performed for the relief of an inflammatory condition of the bursa. When Dr. Gwinn saw Portnoy two months after the operation, the adhesions from the operation had not disappeared. In February he had pretty good movement of the shoulder joint; there was some resistance when the arm was raised above a right angle; at that time he thought the adhesions were still present; he found no wasting or atrophy of the muscles; he still had some post-operative adhesions. He last examined him on March 21. Measurement showed no atrophy of the muscles, and he raised his arm to a right angle and let it drop suddenly. He did not think his condition had changed except that the adhesions had loosened up a trifle. He did not consider him disabled. His only symptom was the pain in his upper arm when he would raise it above a right angle. There was no physical condition to justify disability at that time; there was no reason why he should not return to work, — not heavy work, but some form of work to increase the movement of the muscles. Work would be beneficial to him. So far as the physical examination went, his condition now is the same as it was before the operation. He could not raise his arm any better at the last examination than he could at the examination on March, 1913.

John D. Adams, M.D., stated that he examined Portnoy, at the request of the Fidelity and Casualty Company of New York, on March 27, 1914. The examination showed no atrophy of the shoulder muscle. Rotation of the arm in the shoulder joint showed perfectly free movement, without muscle spasm, and no involvement of the shoulder joint proper. There was no surface temperature. Motions of the arm could be elicited to two-thirds abduction, so called, raising the arm from the side; at that point there seemed to be a mechanical resistance, although he was able to force the arm to almost full extent without the presence of muscle spasm or a great deal of discomfort. There is no disability in this patient to prevent the performance of certain types of labor. He should be able to stoop over and lift objects. There might be some mechanical resistance in the

motions of extreme reaching. The resistance is due, in part, to the post-operative adhesions, and may be due to rheumatic conditions. Dr. Adams stated that what resistance there is is a purely voluntary thing, as he was able to force the arm up to its full extent. Whatever resistance there is is capable of being overcome with a certain amount of exercise and forcible movement of the arm. At the time of the examination at the dispensary he prescribed a treatment because he found that this man had voluntary limitation of the motion of the arm, and he was given the advice to use it. Portnoy requires no treatment now but what he can do himself. When he forced Portnoy's arm, he complained of discomfort. Dr. Adams would not call it pain. Two-thirds of the motion of the arm was perfect.

Barnard Portnoy stated that the condition of his arm is about the same now as it was a year ago. He has more pain now than before the operation. He cannot raise his right arm above his head without pain. He has tried to find some light work to do, but without success. He also tried to get a city position, but was unable to do this, as he now lives in Malden. Portnoy is married and has six children. He has no other source of income. He did not try to find work at the Standard Grocery Company, as Mr. Buck promised to find some employment for him there.

The Industrial Accident Board decided to send the employee to an impartial physician for an examination, as provided by Part III., section 8, of the Workmen's Compensation Act, and Dr. Francis D. Donoghue, who made the examination, reported as follows: —

First examination Nov. 4, 1913; second, April 21, 1914. For immediate effects and so forth, see report of November 4. Following last examination he was seen by Dr. Granger and Dr. Cotton on March 30, 1914, and Dr. Codman on April 11. Dr. Cotton recommended that he go to the Boston City Hospital for treatment, and Dr. Codman recommended him to the Massachusetts General Hospital.

In Dr. Codman's opinion "there was a jog at the point where the tuberosity passes under the right acromion, due to some irregularity in the base of the sub-deltoid bursa, and should be exercised."

On passive motion the arm can be put to substantial normal limits, but on voluntary effort it catches at the impinging point at the right acromion, and when the impinging occurs, he loses control. There seems

to be some tenderness on pressure at the anterior edge of the deltoid, and the anterior edge of the muscle running down from the deltoid tubercle on the clavicle seems to be thinner than on the left, and there is some restriction caused by periarthritic adhesions.

He is still unable to do the work of the grocery clerk, but could do a considerable amount of work where full and accurate use of the arm was not required. For his future, it seems to me that it would be better to carry out the treatment indicated, either by the recommendation of Dr. Cotton or by the recommendation of Dr. Codman, to see if full return of function of the shoulder cannot be obtained, rather than to continue as a man with a partially disabled arm.

Accepting the advice of Dr. Codman, he intends to enter the Massachusetts General Hospital or go to Dr. Codman's private hospital.

Upon all the evidence, the Industrial Accident Board finds that the employee, Barnard Portnoy, is now totally incapacitated for work by reason of the injury, and is entitled to the payment of a weekly compensation of \$7, dating from the time of the last payment, on March 24, 1914, and continuing during said total incapacity for work. The Board recommends that the insurer furnish the medical treatment which is necessary to restore the said employee to normal physical efficiency, and that the employee endeavor to obtain and perform any work which the incapacity due to the injury will not prevent him from performing upon the date immediately following the period during which the treatment recommended has accomplished the greatest benefit, compensation to be then paid in accordance with his ability to earn, as provided by Part II., section 10, of the act.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

CASE No. 299.¹

CHARLES H. HUNNEWELL, *Employee*.

GEORGE W. VAN RANKIN COMPANY, *Employer*.

CASUALTY COMPANY OF AMERICA, *Insurer*.

PARTIAL INCAPACITY FOR WORK DUE TO A CONDITION OF
HYSTERICAL BLINDNESS AND NEUROSIS. MAXIMUM COM-
PENSATION AWARDED BECAUSE OF LOW EARNING CAPACITY.
SUPREME JUDICIAL COURT AFFIRMS DECISION OF BOARD.

The evidence showed that the employee, who had previously had his case adjudicated as to total incapacity for work, had obtained a position at which he was able to earn an average weekly wage of \$1.50. He had made several efforts to obtain employment at other places, but without success. The medical testimony showed that his partial incapacity for work was due to a condition of hysterical blindness and neurosis, having a causal relation with the personal injury received by him on Jan. 25, 1913. His average weekly wages at the time of the injury were \$30.

Held, that the employee is entitled to compensation on account of partial incapacity for work under Part II., section 10, of \$10 a week.

Appealed to Supreme Judicial Court.

Decision. — The Supreme Judicial Court affirms the findings of the Industrial Accident Board.

*Findings and Decision of the Industrial Accident Board on
Review of Weekly Payments.*

The claim for review of weekly payments having been filed, the Industrial Accident Board heard the parties and their witnesses on Wednesday, June 10, 1914, at 2 P.M., and finds and decides as follows: —

Charles H. Hunnewell, the employee, testified that he had been working for Daniel E. Pease, at 130 Shawmut Avenue, Boston, answering telephone calls, receiving a weekly wage of \$1.50, for a period of four and one-half months. Previous to his employment by Mr. Pease he had endeavored to get work in several places, among them being a grocery store and a shoe shop. At the grocery store, the proprietor, William Stone, told him he would not have him in the store because he had to be led around. They would not hire him in the shoe store.

¹ For report of committee of arbitration and findings of the Industrial Accident Board covering right of employee to compensation on account of total incapacity for work, see p. 463, Vol. 1, Massachusetts Workmen's Compensation Cases.

He tried other places, but met with a refusal, on the ground that he could not see well enough. The employee stated that his eyesight had not improved. It was getting worse.

Dr. Albert E. Webb stated that he examined the employee on May 16, 1914, at his office at 543 Boylston Street, Boston, and found no pathological condition that could be seen, "simply something to do entirely with his mental condition." The prognosis is uncertain. He may get better some time, that is, in a year or six months. His treatment would be to get away from sympathetic friends and relatives. The doctor stated that he tried to find out whether he was a malingerer, but could not trap him with any method he had. He seemed to be very anxious to please the examiner, and there was no evidence of malingering. The doctor believed that the employee was telling the truth about his condition. There is some disconnection between the eye and the brain, and he is suffering from neurosis, which is the cause of his present incapacity for work.

Dr. A. W. Stearns of 520 Commonwealth Avenue, Boston, a specialist in neurology, testified that he examined the employee on April 10 and April 17, 1914, and found that he was suffering from hysterical blindness and neurosis. The blindness and neurosis are inseparable. Blindness is the neurosis. The burning of his eyes in January of last year would be an adequate cause for this. He could not make a definite prognosis, but would say that in the vast majority of these cases recovery results in from a few weeks to several months. The employee's own desire to get well would be essential. He is suffering from a well-recognized functional disease.

Michael Kenney of 26 Albion Place, Charlestown, testified that he had known the employee six or seven years, and occasionally takes him to his present place of employment. He expressed the opinion that he could not go without an escort.

The Industrial Accident Board finds, upon this evidence, that the employee, Charles H. Hunnewell, is partially incapacitated for work by reason of a condition of hysterical blindness and neurosis, said condition having a causal relation with the personal injury received by him on Jan. 25, 1913; that the said employee is now able to earn an average weekly wage of \$1.50; that his average weekly wages at the time of the injury, Jan.

25, 1913, were \$30; that there is due the employee, as provided by Part II., section 10, a weekly payment of \$10, dating from Feb. 1, 1914, and continuing during the period of his partial incapacity for work, which is not now determinable, the total amount due to June 10, 1914, the date of the hearing, being \$184.29.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
JOSEPH A. PARKS.

Decree of Supreme Judicial Court on Appeal.

RUGG, C.J. The employee received an injury to his left eye in the course of his work for an employer under the Workmen's Compensation Act, St. 1911, chapter 751, on Jan. 25, 1913. He was paid compensation without question until May 31, 1913. Then a hearing was had before a committee on arbitration under Part III., section 7, as amended by St. 1912, chapter 571, section 12, which on July 28, 1913, made an award based on total disability of a weekly compensation to be paid until Oct. 19, 1913. No claim for review of this decision was filed, and it became binding on the parties. On Oct. 16, 1913, the Board gave a hearing upon the claim of the employee that his compensation should be continued on account of actual incapacity for work. On November 5 the Board filed its finding to the effect that the employee's "total incapacity for work on account of said personal injury will cease . . . on Oct. 19, 1913, subject to the right of the said employee to compensation on account of partial incapacity for work under section 10, Part II. of the Workmen's Compensation Act, depending upon his ability to earn wages." In accordance with this finding payment of all compensation to the employee ceased on Oct. 19, 1913. The employee, on May 4, 1914, filed a request "for a review of weekly payments as provided by section 12, Part III. of the act," which empowers the Board to review "any weekly payment under this act." After a hearing the Board found that the employee was "partially incapacitated for work" as a result of his injury of Jan. 25, 1913, and made an award of

weekly compensation dating from Feb. 1, 1914, to continue so long as his partial incapacity should last, — a period not determined by the finding. Thus it appears that, by decisions and findings, the employee was refused compensation from Oct. 19, 1913, to Feb. 1, 1914. The insurer seasonably objected to proceedings before the Board, and now contends that their findings were an excess of jurisdiction.

The insurer rightly contends that the finding of the committee of arbitration, no review having been requested, bound the parties as to all matters covered by it, and that it cannot be reviewed under the machinery provided by the act. (*Young v. Duncan*, 218 Mass. 346.) That finding rightly interpreted does not mean that all compensation shall cease on Oct. 19, 1913, nor that all disability arising from the injury will be at an end on that date. There is no categorical finding to that effect, nor is such a decision fairly to be implied from the terms in which the finding is couched. The finding fixes the amount of compensation on the basis of total disability, and payment will end on that day by force of the period limited for its continuance, unless something further is done. But that is its extent. It does not purport to prevent an application before the expiration of the delimited period to the Board under Part III., section 12, for a review of the weekly payments allowed. To continue further, the same or a smaller weekly payment would be in effect to increase a payment awarded by the committee of arbitration which was to cease on Oct. 19, 1913. The employee was not precluded from applying to the Board under that section before his weekly payments had ceased.

The Board on that application by the employee went no further than to say that the total disability would end on October 19. It did not award any weekly payment for partial disability, nor make any finding on that point, but in effect left it open for later decision "depending on his ability to earn wages."

The action of the Board was not an unqualified decision to end all payments under the act. Such a decision would mean that incapacity of whatever degree arising from the injury had disappeared finally. Doubtless after such a decision the Board would be without power to revive the matter. It would have

become ended and be entirely a thing of the past. The doctrine of *res judicata* would apply to it. (Nicholson v. Piper, 1907, A. C. 215; Green v. Cammell, Laird & Co., Ltd., 1913, 3 K. B. 665.) In this respect our act is in substantially the same words as the English act, and hence English decisions made before the passage of our act are strongly persuasive of the meaning intended by the General Court. (McNicol's Case, 215 Mass. 497, 499.) The form of the decision of the Board was one that total disability had ceased, but whether there was a partial disability or not was left open for further consideration, to be determined somewhat in the light of future ability to get work. The weekly payment was ended absolutely so far as it rested on the basis of total disability, but it was suspended only until the further order of the Board, so far as it might later be found to have a sound basis in partial disability. In substance, the decision was that total disability was over, but whether there would be a partial disability arising out of the injury was a question as to which they were not at that time prepared to give a decision either way, but desired to leave it open still as a question to be answered as the facts might warrant at some future time. This course is justified by the act. It has been the custom under the English act to award compensation at the rate of a penny a week under these circumstances. (Owners of Vessel "Tynron" v. Morgan (1909), 2 K. B. 66, S. C., 2 B. W. C. C. 406; Griga v. London & North Western Railway, 3 B. W. C. C. 116.) That course never has been followed, so far as we are aware, under our act. But it is not necessary even in England that this be done in order to keep the case alive, provided the purpose is plain not to terminate the claim definitively, but to keep it open for further consideration and order. (Taylor v. London & Northwestern Railway (1912) A. C. 242, 245.) That purpose is manifest in the decision here under review. There is nothing in the words of our act which prevents the Board from pursuing this course. The procedure should be flexible and adapted to the direct accomplishment of the aim of the act, with as little formality or hampering restriction as is consistent with the preservation of the real rights of the parties and the doing of justice according to terms of the act. It is within the power of the Board

to decide that for a time compensation shall be suspended but not ended, with reservation to leave to the employee to apply for further payments under the act, provided this course in its opinion is required by the facts. There is nothing inconsistent with this conclusion in *Burn's Case*, 218 Mass. 8.

It is urged that because all weekly payments in fact stopped, there was nothing further for the Board to deal with under Part III., section 12, and that it could not end, diminish or increase a weekly payment which had ceased to exist six months before the hearing. That contention would be unanswerable if the earlier decision had been that weekly payments should end finally. But, as has been pointed out, that was not the earlier decision, and the Board in its decision now under review was proceeding strictly in accordance with the lines left open by express reservation in its former decision. The propriety of such a decision, in order to further the purpose of the act, has been pointed out in *Owners of the Vessel "Tynron" v. Morgan*, 1909, 2 K. B. 66, at 70. If, for example, the injury is of such nature that the employee may work at full pay at certain times dependent upon temperature or climate, and at other seasons is incapacitated, it would not be in harmony with the design of the act either to give him compensation while he was earning his normal wages or to deny it to him during the time when incapacitated by his injury.

The decision in this respect might be made to take effect as of a date antecedent to the date of the application. (*Bagley v. Furness Withey & Co., Ltd.* (1914), 3 K. B. 974 (C. A.); *Gibson v. Wishart* (1914), Weekly Notes (House of Lords), 232.) Hence the award of the Board on the application of the employee filed in May, that the weekly compensation should be paid from the first of the preceding February, was within its lawful power.

The physical injury to the eye of the employee in the case at bar was slight, and he soon recovered from it completely so far as concerned harm to the organ itself. But the committee on arbitration found that "the injury to the eye caused a nervous upset and a neurotic condition which is purely functional." The Board found that he was "partially incapacitated for work by reason of a condition of hysterical blind-

ness and neurosis, said condition having a causal relation with the personal injury." These findings, which seem to be identical in substance, were warranted by the evidence. Apparently he did not have sufficient will power to throw off this condition and go to work as his physical capacity amply warranted him in doing. But such a condition resulting from a battery is an injury for which a tortfeasor would be liable in damages. (Spade v. Lynn & Boston Railroad, 168 Mass. 285; S. C., 172 Mass. 488; Berard v. Boston & Albany Railroad, 177 Mass. 179; Homans v. Boston Elevated Railway, 180 Mass. 456; Bell v. New York, New Haven & Hartford Railroad, 217 Mass. 408, 410.) The same principle applies to injuries following as a proximate result from an actual physical impact received by an employee, under the act, in the course of and arising out of his employment.

Decree affirmed.

CASE No. 391.

EMILY SUNDINE, *Employee.*

F. L. DUNNE & Co., *Employer.*

LONDON GUARANTEE AND ACCIDENT COMPANY, LTD., *Insurer.*

EMPLOYEE RECEIVES INJURY WHILE DESCENDING STAIRS WHICH WERE THE ONLY MEANS OF INGRESS AND EGRESS. ENTITLED TO COMPENSATION. SUPREME JUDICIAL COURT AFFIRMS DECISION OF THE BOARD.

The employee was injured while going down a flight of stairs leading from the third floor to the second floor of the building in which she was employed. There was no other way by which she could go to the street except down the stairway on which she was injured. She was on her way to luncheon when the injury occurred.

Held, that it was a necessary incident of her employment to use the flight of stairs upon which the injury occurred, and that said injury arose out of and in the course of her employment.

Appealed to the Supreme Judicial Court.

Decision. — The Supreme Judicial Court affirms the findings of the Industrial Accident Board.

Agreed Statement of Facts.

Said Sundine was injured Nov. 29, 1912, while coming down a flight of stairs leading from the third floor to the second floor

of the building numbered 376 Washington Street, Boston. She was coming from the workroom of the F. L. Dunne & Co., on the fourth floor of said building, at about 12 o'clock noon.

At the time of the accident she was on her way out to luncheon, and was descending to the street, accompanied by another woman.

She fell from the second or third step from the top of said flight of stairs to the bottom, and sprained her right ankle as a result of the fall. Said stairs were of wooden construction, and the treads of said stairs were somewhat worn. There was no artificial light or lamp to light these stairs, and the upper part of the flight was dark.

This was the only flight of stairs by which the petitioner could reach or leave the said workroom; there was no elevator for her to use, and it was necessary for her to use this flight of stairs in making her ingress and egress. The plaintiff claims that the accident was due to the insufficient lighting of these stairs, and also to the fact that the same were worn down, causing her to fall.

F. L. Dunne & Co. are covered by insurance under the Workmen's Compensation Act by the London Guarantee and Accident Company, Ltd., Edward Olsen not being covered by insurance under said act.

The F. L. Dunne & Co., on the day of the accident, were the lessees of the workroom in which the plaintiff worked on the fourth floor, they being sub-lessees from A. H. Howe & Sons, who were the lessees of the whole building.

The workroom was used exclusively for making clothing for the F. L. Dunne & Co., who let out their work to different men, who were paid a stipulated price per garment, said F. L. Dunne & Co. furnishing the goods.

One of the men who made clothing for said F. L. Dunne & Co. in this room was Edward Olsen, and said Olsen paid the petitioner her weekly wages of \$12 for assisting him in making clothing for said F. L. Dunne & Co.

The plaintiff was out of work from Nov. 29, 1912, to Feb. 24, 1913, which latter date was the earliest date at which she was able to go to work. The attending physician's bill for the first two weeks' services was \$24.

The above-agreed statement of facts is respectfully submitted to the commissioners, that a decision may be had whether the case is covered by the Workmen's Compensation Act. A copy of the lease under which F. L. Dunne & Co. occupied said premises is annexed and may be referred to.

RICHARD J. LANE,
Attorney for Emily Sundine.

H. S. AVERY,
Attorney for London Guarantee and Accident Company, Ltd.

Lease.

This indenture, made the seventh day of August in the year nineteen hundred and eleven between Alfred H. Howe, Irving B. Howe and E. Warner Howe, co-partners doing business in Boston under the firm name and style of A. H. Howe & Sons, (hereinafter called the Lessor) of the one part and Frank L. Dunne, Thomas Jackson and Charles J. Erickson, all of Boston in the County of Suffolk, co-partners under the style of F. L. Dunne & Co. (hereinafter called the Lessees) of the other part, *witnesseth*, That in consideration of the rent and covenants herein reserved and contained on the part of the Lessees and their heirs, executors, administrators and assigns, to be paid, performed and observed, the Lessor do hereby demise and lease unto the Lessees the fourth floor of the building numbered 376 Washington Street, Corner of Franklin Street in said Boston. In addition to the covenants hereinafter contained, the lessees covenant and agree that at any time hereafter during the term of this lease, the lessors and their agents or servants may enter said leased premises and install a passenger elevator, and for said purpose may take possession of such part of said leased premises as may be necessary, and make any reasonably necessary alterations or changes in said premises; and the lessees further covenant and agree to hold and save harmless the lessors from any damage resulting in any way from the installation of said elevator. In case said elevator is installed as aforesaid, the lessees further covenant and agree to pay to the lessors \$100 per year for the use of said elevator in addition to the rent hereinafter named, said payment to be made by equal monthly payments of \$8.33 each month payable at the time said rent becomes due. *To have and to hold* the premises hereby demised unto the Lessees, their executors, administrators and assigns, for the term of three (3) years from January 1st, 1912. *Yielding and paying* therefor the yearly rent of One thousand (\$1,000) dollars, during the said term by equal monthly payments of Eighty-three and ~~100~~ (\$83.33) dollars on the first day of each and every month for the month ending with the day prior to the first monthly payment to be made on the day of month next, and also at the legal deter-

mination of this lease a proportionate part of the said rent for any part of a then unexpired. And the Lessees do hereby for themselves and their heirs, executors, administrators and assigns both individually and as a firm, covenant with the Lessors, their heirs and assigns, that the Lessees, their executors, administrators, or assigns, during the said term and for such further time as they or any other person or persons claiming under them shall hold the said premises or any part thereof, will pay unto the Lessors, their heirs or assigns, the said rent at the times and in the manner aforesaid, and will keep all and singular the said premises in such repair, order and condition as the same are in at the commencement of the said term, or may be put in during the continuance thereof, damage by fire or other unavoidable casualty only excepted; and will save the Lessors, their heirs and assigns harmless from all loss and damage occasioned by the use or escape of water upon the said premises, or by the bursting of the pipes, or by any nuisance made or suffered on the premises; and will not assign this lease nor underlet the whole or any part of the said premises without first obtaining on each occasion the consent in writing of the Lessors, their heirs and assigns; and will not permit any hole to be drilled or made in the stone or brickwork of the said building, or any placard or sign to be placed upon the building, except such and in such place and manner as shall have been first approved in writing by the Lessors, their heirs or assigns; and will keep good with glass of the same kind and quality as that which may be injured or broken, all the glass now or hereafter in the premises, unless the same shall be broken by fire, acknowledging that the same is now whole and in good order; and at the expiration of the said term will remove their goods and effects, and those of all persons claiming under them, and will peaceably yield up to the Lessors, their heirs or assigns, the said premises, and all erections and additions made to or upon the same, in good repair, order and condition in all respects, damage by fire or other unavoidable casualty excepted; and that during the said term, and such further time as aforesaid, the said premises shall not be overloaded, damaged or defaced; and no trade or occupation shall be carried on upon the said premises, or use made thereof which shall be unlawful, improper, noisy, or offensive, or contrary to any law of the Commonwealth or ordinance or by-law of the City of Boston for the time being in force, or injurious to any person or property; and no act or thing shall be done upon the said premises, which may make void or voidable any insurance of the said premises or building against fire, or may render any increased or extra premium payable for any such insurance; and no addition or alteration to or upon the said premises shall be made without the consent of the lessors, their heirs or assigns; and all property of any kind that may be on the premises shall be at the sole risk of the Lessee, or those claiming through or under them, and the Lessors, their heirs or assigns shall not be liable to the Lessee or any other person for any injury, loss or damage to any person or property

on the premises; and that the Lessors, their heirs or assigns or their agents may during the said term, at seasonable times, enter to view the said premises and may remove placards and signs not approved and affixed as herein provided, and may make repairs and alterations if they should elect so to do, and may show the said premises and building to others, and at any time within three months next before the expiration of the said term may affix to any suitable part of the said premises a notice for letting or selling the said premises, or building, and keep the same so affixed without hindrance or molestation. *Provided always*, that in case the said premises, or any part thereof, or the whole or any part of the building of which they are a part, shall be taken for any street or other public use, or shall be destroyed or damaged by fire or other unavoidable casualty, or by the action of the City or other authorities after the execution hereof and before the expiration of the said term, then this lease and the said term shall terminate at the election of the Lessors, or their heirs or assigns, and such election may be made in case of any such taking notwithstanding the entire interest of the Lessors, or their heirs or assigns may have been divested by such taking; and if they shall not so elect, then in case of any such taking or destruction of or any damage to the demised premises, a just proportion of the rent thereinbefore reserved, according to the nature and extent of the injury sustained by the demised premises, shall be suspended or abated unto the demised premises, or in case of such taking, what may remain thereof, shall have been put in proper condition for use and occupation.

Provided also, and these presents are upon this condition, that if the Lessees or their executors, administrators or assigns do or shall neglect or fail to perform or observe any of the covenants contained in these presents, and on their part to be performed or observed; or if the estate hereby created shall be taken on execution, or by other process of law, or if the Lessees or their executors, administrators, or assigns shall be declared bankrupt or insolvent according to law, or if any assignment shall be made of their property for the benefit of creditors, then and in any of the said cases, (notwithstanding any license of any former breach of covenant or waiver of the benefit hereof or consent in a former instance) the Lessors, or their heirs or assigns, lawfully may, immediately, or at any time thereafter, and without demand or notice, enter into and upon the said premises or any part thereof in the name of the whole, and repossess the same as of their former estate, and expel the Lessees and those claiming through or under them and remove their effects (forcibly, if necessary), without being deemed guilty of any manner of trespass, and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and upon entry as aforesaid this lease shall determine; and the Lessee covenant that in case of such termination they will indemnify the Lessors, their heirs and assigns, against all loss of rent and other payments which they may incur

by reason of such termination during the residue of the time first above specified for the duration of the said term.

In witness whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

ALFRED H. HOWE L. S.
 IRVING H. HOWE.
 E. WARNER HOWE.
 F. L. DUNNE & Co. L. S.
 E. J. ERICKSON.
 THOMAS JACKSON.

Finding and Decision of the Industrial Accident Board on Agreed Statement of Facts.

This case came before the Industrial Accident Board on the agreed statement of facts hereto annexed, on Thursday, Oct. 2, 1913.

Emily Sundine was injured on Nov. 29, 1912, while coming down a flight of stairs leading from the third floor to the second floor of the building numbered 376 Washington Street, Boston. The workroom in which she was employed was on the fourth floor of said building, and there was no other way by which she could go to the street except down the stairway on which she was injured. She was on her way to her luncheon when the accident happened.

F. L. Dunne & Co. are merchant tailors, and Edward Olsen was one of the men who made clothing for said F. L. Dunne & Co., in the workshop of F. L. Dunne & Co., and Emily Sundine was employed by Olsen.

We find that it was a necessary incident of her employment to use the flight of stairs upon which she was when she was injured, and, therefore, rule that the injury arose out of and in the course of her employment. (Olsen *v.* Andrews, 168 Mass. 261; Kilduff, Admr., *v.* Boston Elevated Railway Co., 195 Mass. 307; Lowry *v.* Sheffield Coal Company, 24 T. L. R. 142-1 B. W. C. C. 1; Sharp *v.* Johnson, 2 K. B. 139-74 L. J. K. B. 566-7 M-S. 28.)

It also appears from the statement of facts that Olsen, for whom the employee was working, was a contractor for F. L. Dunne & Co. within the meaning of section 17, Part III., of the

Workmen's Compensation Act, and we rule that she is entitled to compensation.

It was agreed that her average weekly wages were \$12.

We therefore find that she is entitled to compensation at the rate of \$6 a week from the fifteenth day after her injury, to wit, from Dec. 13, 1912, to the twenty-third day of February, 1913, inclusive, amounting in all to \$62.57, together with her physician's bill for medical services for the first two weeks after the injury, which it was agreed was \$24, amounting in all to \$86.57.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

Decree of Supreme Judicial Court on Appeal.

SHELDON, J. It is provided by statute (St. 1911, c. 751, Part III., § 17) that "if a subscriber enters into a contract, written or oral, with an independent contractor to do such subscriber's work, . . . and the association would, if such work were executed by employees immediately employed by the subscriber, be liable to pay compensation under this act to those employees, the associations shall pay to such employees any compensation which would be payable to them under this act," if the independent contractor were a subscriber. By the word "association" is meant the Massachusetts Employees Insurance Association, Part V., section 2, of the same act; and this insurance company is under the same liability that the association would have been (St. 1912, c. 571, § 17). It follows that the petitioner has the same rights against this insurance company as if it had directly insured her employer Olsen.

The insurer does not deny this, but it contends that the petitioner's injury did not arise "out of and in the course of" her employment within the meaning of Part II., section 1, of the act first referred to. This is because she was injured at about noon, after she had left the room in which she worked, for the purpose of getting a lunch, and upon a flight of stairs which, though affording the only means of going to and from her workroom, was yet not under the control either of Olsen

her employer or of Dunne & Co., for whose work Olsen was an independent contractor.

The first contention, that she was not in the employ of Olsen while she was going to lunch, cannot be sustained. Her employment was by the week. It would be too narrow a construction of the contract to say that it was suspended when she went out for this merely temporary purpose, and was revived only upon her return to the workroom. It was an incident of her employment to go out for this purpose. (*Boyle v. Columbian Fire Proofing Co.*, 182 Mass. 93, 102.) The decisions upon similar questions under the English Act are to the same effect. *Blovelt v. Sawyer* (1904), 1 K. B. 271, which went on the ground that the dinner hour, though not paid for, was yet included in the time of employment (*Moore v. Manchester Lines*, 3 Butterworth's Workmen's Compensation Cases, 527), where the House of Lords reversed the decision of the Court of Appeal, reported in (1909) 1 K. B. 417, and held, following the dissenting opinion of Fletcher Moulton, L.J., that a temporary absence by permission, though apparently of longer duration than would have been likely in the case before us, did not suspend the employment, and that an injury occurring during such a temporary absence arose "out of and in the course of" the employment. (*Gane v. Norton Hill Colliery*, 2 Butterworth's W. C. C. 42, and (1909) 2 K. B. 539; *Keenan v. Flemington Coal Co.*, 40 Sc. Laws Rep. 144; *McKenzie v. Coltness Iron Co.*, 41 Sc. Law Rep. 6.)

Nor do we regard it as decisive against the petitioner that she was injured while upon stairs of which neither Olsen nor Dunne & Co. had control, though they and their employees had the right to use them. These stairs were the only means available for going to and from the premises where she was employed, the means which she practically was invited by Olsen and by Dunne & Co. to use. In this respect the case resembles *Moore v. Manchester Lines*, *ubi supra*; and that case, decided under the English Act before the passage of our statute, must be regarded as of great weight. (*McNicol's Case*, 215 Mass. 497, 499.) It is true that before the passage of St. 1911, chapter 751 the petitioner could not have held her employer for this injury. (*Hawkes v. Broadwalk Shoe Co.*, 207 Mass. 117.)

But that now is not a circumstance of much importance, for one of the purposes of our recent legislation was to increase the right of employees to be compensated for injuries growing out of their employment.

It was a necessary incident of the petitioner's employment to use these stairs. We are of opinion that according to the plain and natural meaning of the words an injury that occurred to her while she was so using them arose "out of and in the course of" her employment. The decree of the Superior Court must be affirmed.

So ordered.

CASE No. 641.

JOHN S. COLLINS, *Employee.*

AMERICAN WRITING PAPER COMPANY, *Employer.*

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, *Insurer.*

INSURER DECLINES TO PAY FEES OF ARBITRATORS AND APPEALS
TO SUPREME JUDICIAL COURT.

The Industrial Accident Board duly notified the insurer of its approval of the payment of a fee of \$5 to each of two arbitrators, representing, respectively, the insurer and employee, on a committee of arbitration duly formed in accordance with the statute. The insurer declined to pay the fees.

Held, that there is due from the insurer the sum of \$5 to each of the arbitrators for services in the above case.

Appealed to Supreme Judicial Court.

Findings and Decision of the Industrial Accident Board.

This matter came before the Industrial Accident Board under Part III., section 16, of the Workmen's Compensation Act, a committee of arbitration having been duly formed to hear the evidence in the above case, as provided by the statute, and the insurer having declined to pay the fees of said arbitrators, as provided by Part III., section 9.

The Industrial Accident Board duly notified the insurer of its approval of the payment of a fee of \$5 each to Harry R. Elder of Springfield, Mass., representing the insurer, and James M. Kennedy of Holyoke, Mass., representing the employee, and was informed by the insurer that "our position is that the Board of arbitration had no jurisdiction, and therefore we are

not bound to pay the fees of the arbitrators. We propose, with all deference to the contrary opinion expressed by the Board, to maintain this position unless the Supreme Court should decide otherwise."

The Industrial Accident Board finds and rules that there is due from the insurer, the said American Mutual Liability Insurance Company, to the said Harry R. Elder and James M. Kennedy, the sum of \$5 each, as fees for services as arbitrators in the above case.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

LATE SUPREME JUDICIAL COURT DECISIONS.

CASE No. 223.

MICHAEL CHEEVERS, *Employee.*

WILLIAM A. PIERCE, *Employer.*

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *Insurer.*

INDEPENDENT CONTRACTOR NOT ENTITLED TO COMPENSATION.

PROPRIETOR INJURED WHILE DRIVING HIS OWN TEAM, ENGAGED IN THE COURSE OF HIS OWN BUSINESS AND IS NOT AN EMPLOYEE. FINDINGS OF THE COMMITTEE OF ARBITRATION REVERSED. SUPREME JUDICIAL COURT AFFIRMS DECISION, RULING THAT THE EMPLOYMENT WAS CASUAL.

The injured workman was in the general business of teaming, as a proprietor on his own account, owning horses and wagons and employing men to drive and work with them. While unloading coal from his own cart, the workman received an injury.

Held, that he was entitled to compensation.

Review before the Industrial Accident Board.

Decision. — The Industrial Accident Board reversed the decision of the committee of arbitration and finds that the injury was sustained in the course of the business of the claimant, and that he was not entitled to compensation.

Appealed to Supreme Judicial Court.

Decision. — Supreme Judicial Court affirms decision of Industrial Accident Board, ruling that employment was casual.

Report of Committee of Arbitration.

The arbitration committee appointed under the provisions of section 7, Part III., chapter 751, Acts of 1911, and amendments thereto, having investigated the claim of Michael Cheevers v. Fidelity and Deposit Company of Maryland, this being case No. 223 on the files of the Industrial Accident Board, reports as follows: —

The committee of arbitration, consisting of David T. Dickinson of the Industrial Accident Board, chairman, John W. Kelley, representing the employee, and L. Wallace Hall, rep-

resenting the insurer, after being duly sworn, heard the parties and their witnesses at Pittsfield, Thursday, June 5, 1913, at 1.30 P.M.

The committee finds that said employee on Feb. 28, 1913, received an injury arising out of and in the course of his employment. The employer owned and conducted a coal yard and retail coal business in Pittsfield. The employee owned and conducted a teaming business there, having three or four separate horses and teams, and doing rough teaming. He employed several men to work with these horses and teams, besides working with them himself, and did work for various parties in the vicinity.

He had been employed by this employer, William A. Pierce, at different times and periods in 1911, 1912 and 1913. He did this work with his own horse and team, driving it himself. He put coal into bags at Mr. Pierce's yard and lifted them into his cart, and sometimes filled his cart in bulk from the chute, and usually worked in doing this together with another laborer employed by Mr. Pierce.

His employer directed him what to do, giving him written slips with the names and addresses of the purchasers, and with directions to assist in carrying and putting the coal into the houses, and to receive and bring back the money in payment from some of the purchasers. The man who assisted him in loading went with him to assist in putting the coal into the houses. When Mr. Pierce wanted him to do this work he would say to Cheevers, "I want you to come up and help me." Mr. Pierce was asked in his examination by the insurer at the hearing, "When you said to Cheevers to come and help you, would he have the right to send another man?" and Pierce replied, "No, I wanted Cheevers because he knew how to handle coal."

Pierce paid the helper and Cheevers for this work, paying Cheevers \$5 a day for himself and the team, and hired Cheevers for this general work for no fixed duration of time and for no specified job, and Cheevers worked the same as any other of Pierce's regular men, under his orders, loading, driving and putting in coal.

During the last period when Cheevers was thus working he

began on Feb. 7, 1913, and worked on Feb. 7, 8, 10, 11, 12, 13, 15 and 25, and before this the last period was Feb. 1, 2, 5, 6 and 7, 1912.

Cheevers fell from his wagon while delivering coal as aforesaid on Feb. 25, 1913. Another of Cheevers' men tried to do this work for Pierce on the following day in his, Cheevers' place, but was not able to do the work satisfactorily for Pierce, and was not further employed. The end of Cheevers' right clavicle bone at the shoulder was fractured by the fall and the shoulder dislocated.

The insurer contended that this employment and work of Cheevers when hurt was that of an independent contractor, and was casual. The committee finds that in doing this work Cheevers was so under the direction and control of Pierce that the relation between them was that of master and servant, and that the employment when he was injured was not casual.

It was agreed and found that the average weekly wages of Cheevers at the time of the injury, if he was a servant of Pierce, were \$14 per week.

The committee finds that the employee was wholly incapacitated for work for a period of six weeks following the first two weeks after the injury, and that there is due him from the insurer as compensation the sum of \$42 and \$25 as his reasonable medical expenses, incurred during the first two weeks after the injury.

DAVID T. DICKINSON.
J. W. KELLEY.

L. Wallace Hall dissents.

Findings and Decision of the Industrial Accident Board on Review.

This case was duly submitted to the Industrial Accident Board upon briefs of counsel on a review from the decision and report of the arbitration committee.

The Board, upon the facts found by the committee, believes that an error of law was made in the conclusion of the committee, and accordingly reverses its decision. This reversal is made in accordance with the decisions in *Hunt v. New York, New Haven & Hartford Railroad*, 212 Mass. 102 at 107;

Hussey *v.* Franey, 205 Mass. 415; Shepard *v.* Jacobs, 204 Mass. 110; Delorey *v.* Blodgett, 185 Mass. 126; Driscoll *v.* Towle, 181 Mass. 416 at 418-419.

Cheevers, the injured man in this case, was in the general business of teaming, as a proprietor on his own account, owning horses and wagons and employing men to drive and work with them.

According to the above decisions, and as stated with particular clearness in Hussey *v.* Franey and Driscoll *v.* Towle, it is held to be an implied understanding that the proprietor of such a teaming business retains the control of his horses and wagons when in use, and of their loading and unloading, and is therefore an independent contractor in doing such work, and that if he sometimes does work incidental to his hiring, at the request of his contractee, outside the general scope of the business of his teaming, but nevertheless within its "penumbra," these outside tasks do not make him the general servant of the contractee.

As Cheevers received his injury while he was unloading the coal from his cart, such injury was therefore sustained in the course of his own business, and the insurer of Pierce, his contractee, should not be held liable therefor, and such finding and decision is accordingly made, reversing that of the committee.

JAMES B. CARROLL.
DUDLEY M. HOLMAN.
DAVID T. DICKINSON.
EDW. F. MCSWEENEY.
JOSEPH A. PARKS.

Decree of Supreme Judicial Court on Appeal.

LORING, J. Cheevers contended that he was an employee of one Pierce, and that he was entitled to compensation for an injury suffered by him while in that employ.

The facts found by the committee of arbitration were in substance as follows:—

Cheevers conducted a teaming business in the city of Pittsfield, "having three or four separate horses and teams." He

employed several men to work with these horses and teams besides working with them himself. He did work for various persons in Pittsfield and vicinity.

Pierce owned a coal yard in Pittsfield, where he did a retail coal business. At different times in 1911, 1912 and 1913 Pierce employed Cheevers to deliver his (Pierce's) coal with his (Cheevers') horse and team. The course of business was for Cheevers to come to the yard with his horse and team, put the coal into bags and lift them into his cart, or fill his cart in bulk from the chute. Cheevers "usually" was helped in doing this by a laborer employed by Pierce. Pierce gave Cheevers written slips with the names and addresses of the purchasers of the coal, and with directions "to assist in carrying and putting the coal into the houses;" and the man who helped Cheevers in loading the coal at the yard went with him to help in putting the coal into the houses. This helper was paid by Pierce. Cheevers was paid \$5 a day for himself and his team. Pierce "hired Cheevers for this general work for no fixed duration of time and for no specified job." When Pierce wanted Cheevers he would say to him, "I want you to come up and help me," and when asked by the committee of arbitration whether Cheevers would have a right to send another man, Pierce replied, "No, I wanted Cheevers because he knew how to handle coal."

As we construe the record, the accident happened on Feb. 25, 1913, though in one place in the record it is stated that it happened on Feb. 28, 1913. On this day Cheevers fell from his cart while delivering coal. One of Cheevers' men tried to do the work for Pierce on the following day in Cheevers' place, but was not able to do it to Pierce's satisfaction, and Cheevers' horse and team and man were not employed further. The last period Cheevers worked for Pierce (that is to say, the period here in question) was on Feb. 7, 8, 10, 11, 12, 13, 15 and 25. The last period before that was on Feb. 1, 2, 5, 6 and 7, 1912. In addition, the arbitration committee made this further finding, to wit: "Cheevers worked the same as any other of Pierce's regular men, under his orders, loading, driving and putting in coal." The committee decided "that in doing this work Cheevers was so under the direction and control of Pierce

that the relation between them was that of master and servant," and made an award in his favor.

The Industrial Accident Board, on review of this decision of the committee of arbitration, made the following decision: "the Board, upon the facts found by the committee, believes that an error of law was made in the conclusion of the committee, and accordingly reverses its decision. This reversal is made in accordance with the decisions in *Hunt v. New York, New Haven & Hartford Railroad*, 212 Mass. 102, at 107; *Hussey v. Franey*, 205 Mass. 413; *Shepard v. Jacobs*, 204 Mass. 110; *Delorey v. Blodgett*, 185 Mass. 126; *Driscoll v. Towle*, 181 Mass. 416, at 418, 419. Cheevers, the injured man in this case, was in the general business of teaming, as a proprietor on his own account, owning horses and wagons and employing men to drive and work with them. According to the above decisions, and as stated with particular clearness in *Hussey v. Franey* and *Driscoll v. Towle*, it is held to be an implied understanding that the proprietor of such a teaming business retains the control of his horses and wagons when in use, and of their loading and unloading, and is therefore an independent contractor in doing such work."

Cheevers has contended that by reason of the special finding made by the committee, this case is taken out of the ordinary rule (applied in *Hussey v. Franey*, *ubi supra*, and *Driscoll v. Towle*, *ubi supra*), and is brought within the decision in *Linnehan v. Rollins*, 137 Mass. 123. We do not find it necessary to come to a decision upon that contention because we are of opinion that on the facts found by the committee Cheevers' employment was casual.

The meaning of this clause was considered at length in *Gaynor's Case*, 217 Mass. 66. In addition to what was said there it may be of importance (in determining whether in a particular case the "employment is but casual") to have in mind the reason for this limitation upon the class of persons who are entitled to the benefits of the Workmen's Compensation Act. The scheme created by the Workmen's Compensation Act is a scheme of insurance in which the premiums to be paid by the employer are based upon the wages paid by him to his employees. It may have been thought impracticable to work

out a scheme of insurance if persons who are only occasionally employed are to be included among those insured. This limitation was repealed by St. 1914, c. 708, § 13.

Both on the reasoning in Gaynor's Case, and having in mind the reason for this limitation, we are of opinion that Cheevers' employment was but casual. In Howard's Case, 218 Mass. 404, the employee was continuously employed, though not by the same employer, and for that reason the employment was not an employment which was "but casual." For a similar case see Sabella v. Brazeiro, 91 Atl. Rep. 1032. In Schaeffer v. de Grottola, 85 N. J. L. 444, and in Scott v. Payne Brothers, 85 N. J. L. 446, the employment was, or could be found to be, employment for an indefinite period, and therefore not casual.

The entry must be

Decree affirmed.

CASE No. 419.

JOB STICKLEY, *Employee.*

THOMAS CAVANAGH, *Employer.*

ROYAL INDEMNITY COMPANY, *Insurer.*

Decree of Supreme Judicial Court on Appeal.¹

CROSBY, J. This is an appeal from a decree of the Superior Court confirming the decision of the Industrial Accident Board. The employee received an injury on Dec. 13, 1912, which resulted in the loss of four fingers of his right hand. It is conceded by the insurer that he was wholly incapacitated for work by reason of the injury from that date until May 16, 1913, when he obtained employment from his former employer as a watchman, for which he was paid at the rate of \$14 a week; and later he was put back on his old job as a pile driver at \$2.75 a day. Between May 16 and Oct. 17, 1913, he worked eighteen days. It is agreed that he is entitled to compensation for partial incapacity from July 11 to Oct. 17, 1913.

There was evidence that since Oct. 17, 1913, he has been

¹ For report of committee of arbitration and findings of Industrial Accident Board, see p. 248, Vol. 2, Massachusetts Workmen's Compensation Cases.

unable to obtain employment on account of this inability, although he has made diligent efforts to get work.

The committee of arbitration has found that on account of his incapacity to work and his inability to secure employment the employee is entitled to \$8.70 a week from Oct. 17, 1913, the date when the partial incapacity ceased, for an indefinite period, subject to the right of review under section 12, Part III., chapter 751, of St. 1911. This is equivalent to a finding of total incapacity for work since Oct. 17, 1913.

The Industrial Accident Board also has found that the employee has been totally incapacitated for work by reason of his injury since Oct. 17, 1913; that this finding is made subject to the right of either of the parties to a review under section 12, Part III., of chapter 751 of St. 1911.

The insurer contends (1) "that as matter of law, there being no physical change, a man who has once been found to be only partially incapacitated cannot again become totally incapacitated for any reason;" and (2) "even if, as matter of law, a man may without physical change become totally incapacitated after being only partially incapacitated, such a situation has not here occurred."

We are of opinion that these contentions are not open to the insurer. The report of the committee of arbitration states that "the material testimony was substantially as follows:" then follows the testimony of certain witnesses, including that of the employee; if this statement can be construed as a statement that all the evidence is reported, still, there is nothing in the record to show that all the evidence submitted to the Industrial Accident Board, and upon which it made its decision, is reported to this court.

The Industrial Accident Board recites in its decision that it "heard the parties," and also that it "affirms and adopts the findings of the committee of arbitration." The insurer states in its brief that the decision of the Board is based upon the facts found by the committee of arbitration; the employee, on the other hand, contends that all the evidence is not reported by the Board and is not before this court. We cannot assume that all the evidence upon which the Industrial Accident Board made its findings and decision is before us in the

absence of any statement on the record to that effect. It cannot be determined, therefore, whether the rulings requested by the insurer should have been given. (Brightman's Case, Mass. 219, Dec. 31, 1914.) Accordingly, the entry must be

Decree affirmed.

CASE No. 431.

FRANK LEVERONI, ADMINISTRATOR OF ESTATE OF ROCCO FUMICIELLO, *Employee.*

LATHROP & SHEA, *Employer.*

TRAVELERS INSURANCE COMPANY, *Insurer.*

*Decree of Supreme Judicial Court on Appeal.*¹

BRALEY, J. The undisputed material facts show that the deceased employee, while returning home at the close of the day's work, entered upon a railroad track, where he was struck by a train and killed, and the question for decision is whether the injury arose out of and in the course of his employment. (St. 1911, Part II., section 1.)

It is plain that if, as the record states, it was necessary for him to pass over the railroad location, it formed no part of the employer's plant; nor was it in any way connected therewith or in their control, as was the common stairway used by employees in Sundine's Case, 218 Mass. 1. The contract of employment did not provide for transportation or that he should be paid for the time taken in going and returning to his place of employment, and when the day's work had ended the employee was free to do as he pleased. If he had chosen to use the public ways, and had been injured by a defect or passing vehicle, the administrator could not recover against the employer because there would be no causal connection between the conditions of employment and the injuries suffered. (McNicol's Case, 215 Mass. 497; Holness v. McKay & Davis (1899), 2 K. B. 319.)

The principle is the same and equally applicable where the

¹ For report of committee of arbitration and findings of Industrial Accident Board, see p. 267, Vol. 2, Massachusetts Workmen's Compensation Cases.

employee uses a private way or crosses the land of another, either as licensee or trespasser. The decree for the insurer was properly entered and should be affirmed.

So ordered.

CASE No. 434.

THOMAS SEPTIMO, *Employee.*

BOSTON RUBBER SHOE COMPANY, *Employer.*

MASSACHUSETTS EMPLOYEES INSURANCE ASSOCIATION, *Insurer.*

*Decree of Supreme Judicial Court on Appeal.*¹

CROSBY, J. This is a proceeding under the Workmen's Compensation Act. The employee, Septimo, received an injury which arose out of and in the course of his employment, and thereafter, during a part of the period between the date of his injury and the filing of his claim with the Industrial Accident Board, he was employed by his former employer and was paid \$9 a week. Before he was injured his weekly wages were \$10.

While he was so employed, after his injuries, the mill where he worked was shut down for three and five-sevenths weeks, "owing to the slackening up of business." During this time he received no wages. The question in controversy is whether he was entitled to compensation for the three and five-sevenths weeks when the mill was closed, upon a partial or total incapacity for work.

This case is to be decided upon the facts found by the Industrial Accident Board in its review of the report of the committee of arbitration, if there was any evidence to warrant these findings. (Diaz's Case, 217 Mass. 36; Donovan's Case, 217 Mass. 76; Bentley's Case, 217 Mass. 79.)

The Industrial Accident Board, after hearing, found that the employee "was not able to earn anything by reason of his injury during each of the three and five-sevenths weeks." This is equivalent to a finding that the employee was totally incapacitated for work during that period. As the evidence is

¹ For report of committee of arbitration and findings of Industrial Accident Board, see p. 297, Vol. 2, Massachusetts Workmen's Compensation Cases.

not reported, it cannot be found as matter of law that such finding was not warranted.

The insurer contends that because the employee was employed after his injury and paid wages at the rate of \$9 a week, a finding of total incapacity for work during the time that the mill was closed was not warranted.

We do not think that this contention can be maintained. While such employment was evidence that the employee was not wholly incapacitated for work, yet it was not conclusive.

The committee of arbitration found that it was probable, considering his injured condition, that he would not have been able to obtain work or to earn anything elsewhere. The record shows that he was seriously crippled and disabled. The photograph, which is annexed to and made part of the report of the Board, shows that he has lost the whole of every finger, except the forefinger of his right hand and the little, or fourth, finger of his left hand.

When the grave character of these injuries is considered we cannot say, without the evidence before us, that the finding of total disability for work of the employee was not warranted. It follows that the amount which he would have been entitled to receive for partial incapacity for work becomes immaterial and need not be considered.

It was found by the committee of arbitration that during the period when the mill was closed he earned no wages, and it did not appear that he had made any effort to earn anything during that time.

The insurer contends that in view of this finding, compensation should be based upon a partial incapacity for work under the provisions of section 10 of Part II. of the act; but as the Board, upon the findings of the committee of arbitration, has found that the employee was totally incapacitated, the findings of the committee, so far as they are in conflict with those of the Board, have been overruled.

So, also, the finding that the employee was physically unable to earn anything during the period when the mill was closed renders immaterial the finding of the committee of arbitration, that he did not make any effort to obtain employment.

In view of this finding of fact we need not consider the fur-

ther contention of the insurer, that the failure of the employee to work during this time was due to the condition of the labor market and not to his incapacity to earn wages. (Sullivan's Case, 218 Mass. 141; *Irons v. David & Timmins, Limited* (1899), 2 Q. B. 330; *Merry & Cunninghame, Limited, v. Black*, 46 Sc. L. R. 812; *Thompson v. Johnson & Nephew, Limited* (1914), 3 K. B. 694.)

The grounds upon which this decision rest render unnecessary the consideration of other matters determined by the Industrial Accident Board.

Decree affirmed.

PHILOMENE KING *v.* THE VISCOLOID COMPANY.¹

Decree of Supreme Judicial Court on Appeal.

SHELDON, J. The defendant concedes that upon the agreed facts and the inferences to be drawn therefrom the plaintiff had a good cause of action, and is entitled to recover for the loss caused to herself by the injury to her son, unless her right of action is barred by the provisions of the Workmen's Compensation Act, St. 1911, c. 751.

It was undoubtedly the intention of the Legislature by that statute to take away from employees who should become subject to its provisions all other remedies that they had against their employers for injuries happening in the course of their employment and arising therefrom, and to substitute for such remedies the wider right of compensation given by the act. But we find in the act nothing which goes further than this for the protection of the employer. At common law, when this boy was injured, he gained a right of action for himself; and the present plaintiff, his mother, gained another and different right of action for the damage caused to her. The former action, that of the boy himself, has been taken away, and a different remedy has been substituted therefor; but this does not of itself affect the second right of action, — that of the boy's parent. That the boy received full compensation for the

¹ This is not a case under the Workmen's Compensation Act, but is the decision of the Supreme Judicial Court on the claim of the appellant to recover for the loss caused by the injury to her son, said son having received compensation under the statute.

injury to himself does not affect her right to recover for her own loss. (*Wilton v. Middlesex Railroad*, 125 Mass. 130.)

The parent's right of action was not in any just sense consequential upon that of the son. It was independent of his right, and was based upon her personal loss. His action was for the pain and suffering caused by the injury, and for the loss of wages or diminution of earning capacity caused thereby and coming after he should have attained full age. Her action was for the expense to which she had been put by reason of his injury, and for the loss of his services or wages during his minority. It is true that the right of action in each case rested upon the same foundation; that is, the fact that he had been injured by the negligence of the defendant. Under the provisions of the act (St. 1911, c. 751, Part I., § 5) he had waived his right of action; but he had not waived, by his own mere act he could not waive, his parent's independent right. His waiver was by operation of law a discharge of his own right; but no discharge of his right could discharge or take away the right which had become vested in her, just as the election of an employee, under Part III., section 15, of the act, to hold a third party instead of the insurer to compensate him for an injury does not take away his widow's right to hold the insurer for the employee's subsequent death caused by the same injury. (*Cripps' Case*, 216 Mass. 586.)

The express provision in the act, that his right of action is waived or discharged by his failure to give a notice that he claimed his common law rights, is, by recognized canons of statutory construction, an indication that it was not intended to take away the right of any one but himself. The Legislature has stated the consequence that is to follow the failure to give the statutory notice; how can the court say that further consequences shall follow, by taking away the right of a third person not mentioned in the act? (*Dubuque v. Dubuque*, 7 Iowa, 262; *Page v. Bartlett*, 101 Ala. 193; *Perkins v. Thornburgh*, 10 Cal. 189; *Oxford Iron Co. v. Slafter*, 18 Fed. Cas. No. 10, 637.)

The provision that the insurer shall pay a part of the medical expenses made necessary by injury to an employee (Part II., § 5) does not take away by implication the parent's remedy in

a case like this. Doubtless the parent could not recover for expenses which he had not been called on to incur, and in fact had not incurred, but it is not perceived how this could have any greater effect than to reduce somewhat the amount of damages that might be recoverable.

This is not a case in which the plaintiff has taken any benefit under the act, which it might be contended would stop her from making any claim inconsistent with the effect of that act upon the employer. The insurer's payment of the medical and hospital bills was not, so far as appears or is suggested, made at her request, nor did it relieve her from any liability, for it does not appear that she had become liable for these bills. Our decision does not apply to cases where the parent has received any benefit or compensation under the act. Nor do we decide that the plaintiff could recover for medical expenses which had been paid by the insurer, or for her son's services, so far as she had received, or was entitled and able to obtain, for such services the amounts paid therefor to him through his next friend by the insurer. These questions are not presented, for the amount of damages has been agreed upon.

It is probably true that the Legislature in passing this act did not have in mind such a case as is here presented. It did occur to the Legislature of Rhode Island, and is provided for in the statute of that State. (R. I. St. 1912, c. 831, Art. 1, Sec. 6.) Whether our Legislature, if it had dealt with the question, would have made the same provision as was made in Rhode Island, or would have adopted some other course, is mere matter of conjecture.

In our statute there is no direct enactment taking away the parent's right of action, and we find nothing which takes it away by necessary implication. The Legislature simply has not covered the case, as in *Parsons v. Merrill*, 5 Met. 356. If they had chosen not to leave the parent's right of action unaffected they might have taken it away altogether; they might have made some stated division of the allowed compensation between the minor employee and his parent; they might have provided (like the Rhode Island Legislature) that the election between the statutory remedy and that given by the common law should be made by the parent of a minor employee and should bind both parent and child. How can the court say which of

either of these courses should have been adopted by the Legislature? It seems plain that neither one of them can be held to have been manifestly intended by the language of the act. But we have no right to conjecture what the Legislature would have enacted if it had foreseen the occurrence of a case like this; much less can we read into the statute a provision which the Legislature did not see fit to put there, whether the omission came from inadvertence or of set purpose. (See *Hull v. Hull*, 2 Strobh. Eq. 174; *Kankalman v. Gibson*, 171 Ind. 503; *United States v. Musgrave*, 160 Fed. Rep. 700; *United States v. Starn*, 17 Fed. Rep. 435). This is the rule adopted in the construction of all written instruments, that no words can be supplied by construction unless it plainly appears what words ought to be supplied. To this recognized doctrine it is enough to cite *Metcalf v. Framingham Parish*, 128 Mass. 370; *Child v. Child*, 185 Mass. 376; *Sanger v. Bourke*, 209 Mass. 481, 486, 487; and *Springfield Safe Deposit and Trust Co. v. Dwelly*, *ante*.

It may be added, also, that another rule of statutory construction is that an existing common-law right of action is not to be taken away by a statute unless by direct enactment or necessary implication. (*Melody v. Reab*, 4 Mass. 471, 473; *Com. v. Rumford Chemical Works*, 16 Gray, 231, 232; *Commonwealth v. Beck*, 187 Mass. 15, 17.)

It has been suggested that the statutory compensation given to a minor employee is really a payment of wages, citing a detached sentence from the opinion of A. L. Smith, L.J., in *Irons v. Davis & Timmins, Limited* (1899), 2 Q. B. 320, 322. But this is not so. The *quantum* of the compensation is measured by the amount of the wages; but the payment is in place of all the rights of action that belonged to the injured employee, and covers suffering and temporary or permanent disability as well as loss of wages. This is plainly so in the allowance for permanent physical disability under Part II., section 11, though that too is measured by the amount of wages earned. So, too, where the injury is due to the serious and willful misconduct of the employer or superintendent. (Part II., § 3.)

Under the terms of the report, in the opinion of a majority of the court, judgment must be entered in favor of the plaintiff in the sum of \$54.60, with interest from the date of the writ.

So ordered.

MARTINELLI, PETR.¹ (TWO CASES.)*Decree of Supreme Judicial Court on Appeal.*

RUGG, C.J. The petitioner, as administrator of the estates of two different persons, brings these applications in the Superior Court, praying it to issue letters rogatory for taking the testimony of witnesses in the kingdom of Italy, to be used in the hearings on proceedings brought and pending before the Industrial Accident Board for the recovery of the payments provided by the Workmen's Compensation Act, St. 1911, c. 751, for the death of these two decedents.

Letters rogatory as a means of procuring the evidence of witnesses in foreign States are not much in use in this Commonwealth. The statutes make ample provision to this end by means of depositions. The power to issue a commission rogatory in order to prevent a failure of justice is inherent in a court. But it always has been recognized that such power can be put forth only in aid of a cause actually pending in the court which issues the letters. That this must be so is apparent when the nature of the proceeding is considered. It is in form a request to a court of a foreign jurisdiction, asking as matter of comity that that court will take the testimony of a witness or witnesses within its jurisdiction and transmit the same to the court making the request, for its aid in the doing of justice as to a cause before it. The matter is not dependent upon statute, but rests upon the international good will toward each other by which courts of civilized countries are actuated. (Anonymous, 59 N. Y. 314, 315; *State v. Bourne*, 21 Oregon, 218; *Nelson v. U. S.*, 1 Peters C. C. 235; 1 Greenleaf on Evidence, s. 321.)

It is not averred in the application nor contended in argument that the proceedings before the Industrial Accident Board are pending in the Superior Court. Manifestly they are not so pending. The machinery of the Workmen's Compensation Act does not contemplate the ascertainment of facts in that court.

It is not within the power of a court, even of general jurisdiction, to issue letters rogatory to obtain testimony to be used before a tribunal over whose procedure and trials it is given no

¹ This decision is printed for the information and guidance of parties interested in matters pertaining to the Workmen's Compensation Act.

authority until the case itself may be brought before it for review. Therefore, it is not within the authority of the Superior Court to procure evidence for use before a tribunal over whose proceedings it has no more intimate supervisory power than it has over the Industrial Accident Board.

It is urged that power is conferred by that part of St. 1912, c. 571, § 8, which provides that "the Board or any member thereof shall have the power to subpoena witnesses, administer oaths and to examine such parts of the books of records of the parties to a proceeding as relate to questions in dispute. . . . The Superior Court shall have power to enforce by proper proceedings the provisions of this section relating to the attendance and testimony of witnesses and the examination of books and records." These words confer no power to issue letters rogatory or to issue commissions to take depositions. It plainly goes no further than to authorize the court to compel the attendance of witnesses within its jurisdiction and to deal with those who refuse to appear and testify. It would have been a simple matter for the Legislature to have conferred upon the Superior Court the additional power here invoked. It seems quite probable that it was overlooked. At all events, it is unprovided for. Although the Workmen's Compensation Act is to be liberally construed, the court cannot go outside its language for the purpose of assuming a power not granted either expressly or impliedly.

The proper practice was followed of saving exceptions to the granting of the petition. After exceptions were saved and allowed and were pending there could be no appeal.

Appeal dismissed.

Exceptions sustained.

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